Supreme Court U.S.

06-124 2006

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No. _____

In The
Supreme Court of the United States

ALASKA RIGHT TO LIFE COMMITTEE, *Petitioner,*

v.

BROOKE MILES, ANDREA JACOBSON, LARRY WOOD, MARK HANDLEY, JOHN DAPCEVICH, and SHEILA GALLAGHER, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for a Writ of Certiorari

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Questions Presented

Decisions of this Court have established that the First Amendment protects the vigorous discussion of public issues. Alaska, however, has adopted an "electioneering communication" provision that is far broader than the "electioneering communication" provision approved in *McConnell v. FEC*, by, in part, expressly targeting communications that "address an issue of national, state, or local political importance," and by imposing prohibitions and PAC-style burdens on such communications that are far greater than those imposed on federally-defined "electioneering communications."

(1) Whether Alaska's definition of "electioneering communication" violates the First Amendment, facially and as applied to Alaska Right to Life Committee's proposed communication:

   (a) because it is unconstitutionally overbroad and void for vagueness, and

   (b) because the prohibitions and PAC-style burdens, imposed on those who make such "electioneering communications," do not survive strict scrutiny.

Parties to the Proceedings

The names of all parties to the proceedings in the court below whose judgment is sought to be reviewed are contained in the caption of this case. Rule 14.1(b).

Corporate Disclosure Statement

Alaska Right to Life Committee has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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Petition for a Writ of Certiorari

Petitioner respectfully requests a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

Opinions Below

The order of the court of appeals denying rehearing and its judgment are unreported. App. 49a, 50a. Its opinion affirming the district court is at 441 F.3d 773. App. 1a. The district court opinion is unreported. App. 42a.

Jurisdiction

The court of appeals denied Petitioner's rehearing petition on May 1, 2006. App. 49a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitution, Statutes & Regulations Involved

U.S. Const. amend. I is in the Appendix at 51a.
Alaska Stat. § 15.13.040(d), (e), (j), (k) is at 52a.[1]
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Alaska Stat. § 15.13.400(6) is at 58a.
Alaska Stat. § 15.13.400(7) is at 59a.
Alaska Stat. § 15.13.400(8) is at 59a.

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[1]Alaska's Campaign Disclosure Law was revised March 2005 and all citations are to this new revision.

Alaska Stat. § 15.13.400(10) is at 60a.
Alaska Stat. § 15.13.400(12) is at 60a.
Alaska Stat. § 15.13.400(13) is at 60a.
Alaska Stat. § 15.13.400(14) is at 61a.
Alaska Admin. Code tit. 2, § 50.270 is at 61a.
Alaska Admin. Code tit. 2, § 50.292 is at 63a.
Alaska Admin. Code tit. 2, § 50.384 is at 65a.
Alaska Admin. Code tit. 2, § 50.394 is at 66a.

Statement of the Case

This case presents a constitutional challenge by an *MCFL*-corporation[2] to Alaska's definition of "electioneering communication," Alaska Stat. § 15.13.400(5), because it is unconstitutionally overbroad and vague, and because Alaska's Campaign Disclosure Law imposes substantial unconstitutional prohibitions and PAC-style burdens on those that make such "electioneering communications." Alaska Stat. §§ 15.13.040(d), (e), (j) & (k); 15.13.050(a); 15.13.067; 15.13.074(i)[3];

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[2]"*MCFL*-corporations" are those recognized in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 256-65 (1986) ("*MCFL*"), and *McConnell v. FEC*, 540 U.S. 93, 209-11 (2003), as being constitutionally exempt from corporate prohibitions on federal "independent expenditures" and "electioneering communications," and are also exempt from Alaska's corporate prohibition on "express communications" and "electioneering communications" by Alaska statute. Alaska Stat. § 15.13.067(4).

[3]The Ninth Circuit stated that AKRTL did not appeal the district court's upholding of this provision, App. 5a, which provides: "A nongroup entity may not solicit or accept a contribution to be used for the purpose of influencing the outcome of an election unless the potential contributor is notified that the contribution may be used for that purpose." Alaska Stat. § 15.13.074(i). However, this provision was clearly listed as a challenged provision in Issues 1 and 4, Brief of Appellant at 1-2, and arguments were made as to application of the provision. *Id.* at 8, 29-31, 33, 38-39; *see also* Reply Brief at 4 n.5, 5 n.6, 19. More-

15.13.082(b); 15.13.090; 15.13.110; and 15.13.400(6)(C), (7), and Alaska Admin. Code tit. 2, §§ 50.292 and 50.394. These provisions prohibit and chill AKRTL's ability to engage in protected political speech and are unconstitutional on their face and as applied to AKRTL proposed communications.

I. The Statutory Scheme

In general, Alaska's campaign finance regulatory scheme does three main things (as relevant here). First, Alaska defines "electioneering communications" more broadly (and vaguely) than the federal provision approved in *McConnel*, in part, because it targets communications that address "an issue of national, state, or local political importance," rather than communications that are the functional equivalent of express advocacy, and because it goes well beyond broadcast ads to encompass nearly every means of communication.

"'Expenditure' . . . means a purchase or a transfer of money or anything of value . . . for the purpose of . . . influencing the nomination or election of a candidate" and "includes an express communication and an electioneering communication, but does not include an issues communication." Alaska Stat. § 15.13.400(6).[4] An "electioneering communication"[5] (a) directly or

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over, later in its opinion, the Ninth Circuit stated that AKRTL did challenge this provision and ruled on the provision. App. 33a, 36a.

[4] An "'issues communication' means a communication that (A) directly or indirectly identifies a candidate and (B) addresses an issue of national, state, or local political importance and does not support or oppose a candidate for election to public office[.]" Alaska Stat. § 15.13.400(12).

[5] "'Communication' means an announcement or advertisement disseminated through print or broadcast media, including radio,

indirectly identifies a candidate; (b) addresses an issue of national, state or local political importance while attributing a position on that issue to the candidate identified; and (c) occurs within 30 days before a general or municipal election. Alaska Stat. § 15.13.400(5).

Second, Alaska imposes several prohibitions on entities that engage in "electioneering communications," including prohibiting corporate contributions to such entities and requiring prior notification to contributors of such communications. Alaska also requires a mandatory application and recognition of a *MCFL*-corporation as a "nongroup entity," *before* it may make an "lectioneering communication."[6] This prior recognition must be obtained from the Alaska Public Offices Commission ("APOC"). However, under federal law, a *MCFL*-corporation need only claim this status when it files its one-time report. 11 C.F.R. § 114.10 ("qualified nonprofit corporations" need only certify their *MCFL*-corporation status with their report of the activity).

Alaska also requires that "each person shall register" *before* "making an expenditure in support of or in opposition to a candidate . . . [or] a ballot proposition or question." Alaska Stat. § 15.13.050. Only a *registered*

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television, cable, and satellite, the Internet, or through a mass mailing, excluding those placed by an individual or nongroup entity and costing $500 or less and those that do not directly or indirectly identify a candidate or proposition, as that term is defined in AS 15.13.065(c)." Alaska Stat. § 15.13.400(3).

[6]Alaska administrative law sets out the time-consuming and burdensome procedure to determine if one is a "nongroup entity," which must be completed before it is permitted to make either an independent expenditure or an "electioneering communication." Alaska Admin. Code tit. 2, § 50.292.

nongroup entity[7] may make expenditures. Alaska Stat. § 15.13.067 ("expenditures," which includes "electioneering communications").

"Contributions" must be disclosed, Alaska Stat. § 15.13.082(b), and "[a] nongroup entity may not solicit or accept a contribution to be used for the purpose of influencing the outcome of an election unless the potential contributor is notified that the contribution may be used for that purpose." Alaska Stat. § 15.13.074(i).

Third, Alaska imposes PAC-style reporting on those that engage in "electioneering communications," such as AKRTL. *See* App. 8a (Ninth Circuit recognition of the fact that "'nongroup entities' (such as AKRTL)[8] [are] subject to the same disclosure rules as 'groups.'"[9]). Nongroup entities must report all "expenditures" and "contributions," Alaska Stat. § 15.13.040(d), (e), (j),[10]

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[7]A "nongroup entity" is "a person . . . that takes action the major purpose of which is to influence the outcome of an election, and that (A) cannot participate in business activities; (B) does not have shareholders who have a claim on corporate earnings; and (C) is independent from the influence of business corporation." Alaska Stat. § 15.13.400(13).

[8]*MCFL*-corporations are called "nongroup entities." *See* Alaska Stat. § 15.400(13).

[9]PACs are called "groups." *See* Alaska Stat. § 15.400(8).

[10]While both "contribution" and "expenditure" are defined as transactions "made for the purpose influencing," Alaska Stat. § 15.13.400(4) and (6), that phrase has not been construed to narrow its scope or eliminate vagueness. "A . . . nongroup entity may not make an expenditure unless the source of the expenditure has been disclosed as required by this chapter," Alaska Stat. § 15.13.082(b), which "source" is not here limited to "contributions" ("made for the purpose influencing") but seemingly sweeps in donations (gifts made without "the purpose of influencing").

and file periodic reports: "(1) 30 days before the election"; "(2) one week before the election"; "(3) 105 days after a special election"; "(4) February 15"; and within 24-hours for each "contribution" over $250 received "within nine days of the election," Alaska Stat. § 15.13.110, until the nongroup terminates its existence.[11] Under *McConnell*, however, *MCFL*-corporations may make an "electioneering communication," without prior registration, and need disclose only the contributions to and expenditures for the "electioneering communication" on a simple one-time report. 540 U.S. at 194-199.

II. The Facts

AKRTL is an *MCFL*-corporation, i.e., a defined "nongroup entity" under Alaska law, App. 24a (9th Circuit's recognition of status and description of *MCFL*-corporations), but it has not sought official certification of such. AKRTL is an ideological, nonprofit corporation exempt from federal income tax under 26 U.S.C. § 501(c)(4). VC[12] ¶¶ 7, 13-14. AKRTL was not

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[11]If AKRTL were to register as a nongroup entity, it could only discontinue that status and the scheduled periodic reporting by filing a declaration that it is "disbanding . . . ha[s] no plans to reform and will be closing out [its] campaign account." Alaska Admin. Code tit. 2, §§ 50.384, 50.394. So AKRTL itself would have to disband, never form again, dispose of its money in approved ways, and close its general fund accounts to escape perpetual reporting.

[12]The Verified Complaint for Declaratory and Injunctive Relief (VC") was verified by Karen Vosburgh, AKRTL's Executive Director. VC ¶ 12, p. 25. AKRTL is affiliated with two separate entities. Alaska Right to Life Political Action Committee ("AKRTL-PAC") is a separate, segregated fund of AKRTL and is the advocacy arm of the organization. Alaska Right to Life, Inc. ("AKRTL-INC") is an educational organization that is tax exempt

formed by a labor union or corporation. VC ¶ 19. None of its earnings inure to the benefit of any private individual and it has no shareholders. *Id.* AKRTL affords no pecuniary benefits to any private individuals other than reasonable compensation to employees. *Id.* It does not accept corporate or labor union donations. VC ¶ 20. It is not associated with any political candidate, campaign committee, or political party. VC ¶ 10.

Defendants Brooke Miles, Andrea Jacobson, Larry Wood, Mark Handley, John Dapcevich, and Sheila Gallagher are, respectively, the director and members of the Alaska Public Offices Commission ("APOC"), which is empowered to interpret and enforce Alaska's Campaign Disclosure Law. Alaska Stat. §§ 15.13.030, 15.13.380, and 15.13.390; VC ¶ 11. They were sued in their official capacities.

AKRTL is a membership-based association that seeks to promote its pro-life perspective to the Alaska public. VC ¶ 13. It is not registered with APOC. *Id.* AKRTL's major purpose is the promotion of a pro-life consensus in Alaska's public through the presentation of its pro-life message. VC ¶ 14. It accomplishes this in several ways, including telephone calls, Internet, and other forms of communication with the public. *Id.* AKRTL has regularly produced "The Defender," a periodical discussing pro-life issues of concern to AKRTL's members. Samples of articles run in the "Defender" were attached to the Complaint as *Exhibit B*. VC ¶ 15.

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under 26 U.S.C. § 501(c)(3). AKRTL-PAC is registered as a "group" with the Commission under Alaska Stat. § 15.13.400(5). All references to AKRTL refer to the main membership organization, Alaska Right to Life Committee. VC ¶¶ 7-8, 13, 30.

AKRTL considers its members to be those individuals who have donated money to it in the past three years. VC ¶ 17. It has a membership base of 7,000 individuals. *Id.* AKRTL's fundraising is accomplished primarily through telephone solicitation fund-raising campaigns (commonly referred to as "telemarketing," but not involving sales) that it has conducted in the past. VC ¶ 18.

AKRTL would like to continue to influence the life perspective of the Alaskan public. VC ¶ 21. In particular, it had planned to create telephone communications costing more than $500 that would mention candidates' names, discuss political issues relevant to the then-upcoming gubernatorial election on November 5, 2002, and include the candidates' positions on such issues. *Id.* Its telephone calls would also act as a fundraiser for AKRTL. *Id.* A copy of its planned telephone script was attached to the Complaint as *Exhibit C.*[13] *Id.* AKRTL had planned to produce such communications as soon as possible. VC ¶ 25. AKRTL envisioned that its telemarketing campaign would illustrate the significance of pro-life issues, such as abortion and parental consent, at stake in the upcoming gubernatorial election. *Id.* AKRTL will engage in similar fundraising

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[13]The script is as follows:

> Alaska Right to Life is always on the forefront of implementing pro-life legislation within our state, such as banning partial birth abortion, establishing parental consent and stopping state funding. We believe these are important issues affecting all Alaskans. Frank Murkowski supports Alaska Right to Life's pro-life vision by supporting a ban on partial birth abortion, establishing parental consent and stopping state funding. But Fran Ulmer stands in opposition to these measures. Please be sure to vote.

during the next general election in Alaska and in future elections if it obtains the declaratory and injunctive relief requested in its Complaint. VC ¶ 21.

The communications that AKRTL create do not expressly advocate the election or defeat of any clearly identified candidate. VC ¶ 22. Rather, the communications discussed pertinent issues of the day in relationship to legislators and candidates. *Id.* AKRTL has not created its communications with any consultation, cooperation, or coordination with candidates, their agents, or their campaigns, nor at the request or suggestion of any of the same. VC ¶ 23. AKRTL pays for its communications through its general treasury. VC ¶ 24.

AKRTL would like to continue engaging the public in a rigorous examination of societal issues associated with the pro-life movement and the views candidates have on such issues. VC ¶ 26. It is especially important for AKRTL to deliver its message near the time of an election, when the public is most interested in such topics. *Id.* AKRTL would like to discuss such issues and candidates but feels that its speech may contain an "issue" of "political importance" subject to unconstitutional regulation under the law. *Id.* AKRTL was chilled from expressing its political views in the 2002 election and fears enforcement actions against it by the Commission in future elections. *Id.*

In light of AKRTL's anticipated expenditures, Plaintiff's counsel sought general advice in late October from APOC regarding AKRTL's registration, reporting, and disclaimer obligations. VC ¶ 27. In these discussions, APOC confirmed that AKRTL's planned issue advocacy telemarketing would require prior registration and recognition of AKRTL as a "nongroup

entity" and would force it to report and disclaim such communications. *Id.*

Surprisingly, APOC also informed AKRTL that it would be prohibited from making its planned telemarketing expenditure, because AKRTL had previously failed to comply with certain contribution disclaimer provisions when they had not yet been enacted. VC ¶ 28. Because AKRTL had failed to comply with non-existent statutory provisions, it would be unable to "disclose the source of its expenditures," which bars it from making *any* such expenditures using its pre-existing base of contributions. *Id.*

On November 1, 2002, the Alaska Attorney General's Office was given a courtesy draft copy of proposed pleadings in support of a Temporary Restraining Order ("TRO") that were to be filed that day. VC ¶ 29. Upon receipt of the pleadings, the Attorney General initiated phone conferences with Kenneth Jacobus, local counsel in this suit, and AKRTL. *Id.* The Attorney General then faxed local counsel with correspondence stating that AKRTL ("by which it appears to have meant AKRTL-PAC," App. 4a) was not barred from making its expenditures because AKRTL (meaning AKRTL-PAC) was already registered with the Commission as a "group" under Alaska Stat. § 15.13.400(8). *Id.* Since AKRTL was supposedly already a "group" with a source of "regulated funds," the Attorney General reasoned that AKRTL would be allowed to produce its telemarketing during that election so long as the costs were "paid for with group-reported funds" and AKRTL would be required to "follow[] through by continuing to report the expenditures." *Id.* A copy of the Attorney General's faxed letter was attached to the Complaint as *Exhibit D. Id.*

However, Alaska Right to Life Committee and Alaska Right to Life Political Action Committee are two separate entities. VC ¶ 30. And it was not AKRTL-PAC that desired to produce the planned telemarketing but AKRTL, the membership organization. *Id.* AKRTL planned, and continues to plan, to produce unregulated issue advocacy, the funding of which would come from the general funds of AKRTL. *Id.* Thus, this suit was brought on behalf of AKRTL with regard to its First Amendment rights. *Id.*

III. The History of the Litigation

On November 4, 2002, AKRTL filed its Verified Complaint for declaratory and injunctive relief, under the First and Fourteenth Amendments to the U.S. Constitution, against the provisions listed in the Statement of the Case. On November 11, 2002, APOC filed its Answer.

On November 26, 2002, AKRTL moved for summary judgment. After discovery, APOC filed its own summary judgment motion. On June 4, 2004, after briefing and supplemental briefing after *McConnell*, the district court granted APOC's summary judgment motion and denied AKRTL's motion. Judgment was entered on June 8, 2004. Notice of appeal was filed July 7, 2004.

The court of appeals affirmed the district court in an opinion filed March 22, 2006. A petition for rehearing en banc was filed on April 5, 2006, and the court denied it on May 1, 2006. Judgment issued May 12, 2006.

Reasons for Granting the Petition

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people. Although First Amendment protections are not confined to the exposition of ideas, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. . . . of course includ(ing) discussions of candidates . . . . This no more than reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in Monitor Patriot Co. v. Roy[, 401 U.S. 265, 272 (1971)] "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (quotations and citations omitted).

As a result, this Court has consistently protected the discussion of public issues by approving only limited regulation: a one time report on a narrow category of speech: "express advocacy," *MCFL*, 479

U.S. at 262, and its fundamental equivalent, federally-defined "electioneering communications." *McConnell*, 540 U.S. at 194-99.

Alaska, however, has greatly increased the *level of regulation* on a much broader *category of expression*: PAC-style reporting and other prohibitions on entities that do Alaska-style "electioneering communications," which encompass any communication *in any medium* which address "*an issue of national, state, or local political importance.*" As a result, Alaska has set *Buckley* on it head, targeting for regulation the very speech which *Buckley* held was the most protected.

As a result, this petition should be granted because this case presents a matter of great public importance, because the decision of the Ninth Circuit conflicts with this Court's First Amendment jurisprudence, and because it creates numerous significant circuit splits. It also provides this Court an important opportunity to provide desperately needed guidance in this area of the law, which is becoming unbearably complex and burdensome so that the people are chilled in their participation in the core activities of self-government.

I. This Case Involves a Matter of Great Public Importance, Because the Alaska Provisions Seriously Limits the Ability of Advocacy Groups to Discuss Issues of Public Concern.

This case involves a matter of great importance to the American People, namely, their right to freely participate in self-government under a Constitution. The people mandated that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. In that Amendment, the People weighed and balanced the competing provisions of the Constitution

and came down on the side of liberty for themselves and their expression and association.

So the first principle in this area is that the government may not regulate the content of the People's speech. When Congress abridged the People's freedoms of speech and association in the Federal Election Campaign Act of 1971 and the 1974 amendments, this Court turned to first principles when reviewing FECA, *Buckley*, 424 U.S. at 14-15, and pointed to the vital importance of public advocacy of issues. See, *e.g.*, *id.* at 42-43.

To protect that liberty, this Court employed strict scrutiny, requiring the government to bear the heavy burden of proving both that a compelling interest justifies any deviation and that the deviation is narrowly tailored to that interest. The default is constitutional protection. Deviation is the rare exception. The presumption is in favor of the People's liberty and the government is viewed with suspicion. The very function of the Constitution, and its speech liberty mandate, is to limit the government and to protect the people from the government.

Yet the Ninth Circuit upheld Alaska's law, which goes well beyond anything this Court has ever approved and which nearly all other circuits have rejected. But Alaska is just one of several states that have enacted "electioneering communication" provision that go well beyond what this Court approved in *McConnell*.[14] So this case is not just about Alaska's

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[14]In addition to Alaska, fourteen states have "electioneering communication" provisions, most of which are broader than the federal provision. *See* Ariz. Civ. Stat. Ann. § 16-901.01; Cal. Gov. Code § 85310; Colo. Const. Art. XXVIII, § 2(7); Conn. Gen. Stat. § 9-333c; Fl. Stat. § 106.011(18); Hi. Code R. § 11-207.6; Idaho Code

expansion of the "electioneering communication" restrictions. It is a case of national importance, as the states have assumed an expansive reading of what is permitted under *McConnell* and the First Amendment.

II. The "Electioneering Communication" Provision Conflicts With the Decisions of this Court and Numerous Decisions of Other Circuits by Being Unconstitutionally Overbroad.

1. The "electioneering communication" provision is subject to strict scrutiny.

In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), this Court held that business corporations could be constitutionally prohibited from making expenditures and contributions in candidate elections. *McConnell* endorsed this prohibition for federally-defined "electioneering communications." 540 U.S. at 189-94. However, *MCFL*, 479 U.S. at 256-65, and *McConnell*, 540 U.S. at 209-11, held that these prohibitions could not be constitutionally applied to *MCFL*-corporations, such as AKRTL,

Alaska has recognized this difference, prohibiting corporations generally from making "expenditures" in connection with state elections, including "electioneering communications," but allowing *MCFL*-corporations, i.e., "nongroups," to do so. Alaska Stat. § 15.13.067. Alaska, however, has imposed heavy burdens on such speech, including several prohibitions and PAC-style

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Ann. § 67-6602(f); 10 Ill. Comp. Stat. 5/9-1.14; N.C. Gen. Stat. § 163-278.80(2); Okla. Stat. tit. 74, § 257:1-1-2; S.C. Code Ann. § 8-13-1300(31)(c); Vt. Stat. Ann., Titl 17 § 2891; Wash. Rev. Code § 42.17.020(20); W. Va. Code § 3-8-1A(10); *see also* Guam Code Ann. tit.3. § 19112.1.

requirements such as the filing of periodic reports detailing the organization's expenditures and identifying their contributors. Alaska Stat. § 15.13.040(d), (e), and (j); Alaska Stat. § 15.13.110(b). While the Ninth Circuit seemed uncertain whether strict scrutiny applied to the Alaska statute, App. 27a-29a, they eventually claimed that they applied such scrutiny. App. 29a.

This uncertainty is not warranted. This Court has long made clear that just compelled disclosure of a group's expenditures and contributors must satisfy exacting scrutiny. *Buckley*, 424 U.S. at 64-65. However, the burdens imposed by the Alaska scheme goes way beyond disclosure reports to include several prohibitions on entities that make "electioneering communications," including prior registration, Alaska Stat. § 15.13.050, prior administrative qualification as an *MCFL*-corporation, Alaska Admin. Code tit. 2, § 50.292, and prior notification to contributors that their contribution may be used for this purpose. Alaska Stat. § 15.13.074(i). In fact, APOC informed AKRTL that they were prohibited from making their "electioneering communication," since they had not notified their contributors of this possible use of their donation. Thus, "[w]hen a statutory provision burdens first Amendment rights, it must be justified by a compelling state interest." *MCFL*, 479 U.S. at 263.

2. The category of speech regulated by the "electioneering communication" provision is unconstitutionally overboad.

A very narrow category of speech has been found to be subject to government regulation. First, in *Buckley*, this Court found that speech that "expressly advocates

the election or defeat of a clearly identified candidate" could be regulated. Then in *McConnell*, this Court did not reject the *Buckley* strict-scrutiny framework, but operated within it, holding that federally-defined "electioneering communications" may be regulated.

Alaska's definition of "electioneering communication," however, goes well beyond the one upheld in *McConnell*. The federal provision was upheld "to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy," 540 U.S. at 206, with a reporting threshold of $10,000. 2 U.S.C. § 434(f)(1). Alaska, however, targets any communication, within 30 days of a general election, that addresses an issue of national, state or local political importance while attributing a position on that issue to the candidate identified, with a much lower reporting threshold of $500. Alaska Stat. § 15.13.040(j)(4). Further, federal law requires the communication to be "targeted" at the named candidate's district or state, 2 U.S.C. § 434(f)(3)(a)(i)(III), while Alaska requires no targeting.

Under strict scrutiny, Alaska had the burden of proving that Alaska's expanded "electioneering communication" definition is narrowly tailored to a compelling state interest. The Ninth Circuit was required to do more than simply point to a much narrower federal "electioneering communication" as justification for Alaska's broader definition. App. 14a ("The Alaska definition of "electioneering communication" is comparable to the definition of the same term in the federal [BCRA]."); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) ("[T]he Government may not suppress lawful speech as the means to suppress unlawful

speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse."). Rather, APOC bore the burden of demonstrating, *First National Bank v. Belotti*, 435 U.S. 765, 786 (1978), with the sort of record evidence advanced in *McConnell*, *see* 540 U.S. at 196-197, 206, that the expanded scope of Alaska's "electioneering communication" definition is narrowly tailored to a compelling interest, *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994), or at least that it was the functional equivalent of express advocacy. *McConnell*, 540 U.S. at 206. They made no such effort and the decision of the court below upholding the provision conflicts with decisions of this Court.

Furthermore, the decision of the Ninth Circuit upholding the "electioneering communication" provision when it targets communications that address an issue of national, state or local political importance conflicts with the decisions of the First, Second, Fourth, Fifth, Tenth, and Eleventh Circuits,[15] with the decisions of the Supreme Courts of the States of Connecticut, Washington and Wisconsin,[16] and with

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[15] *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *Chamber of Commerce v. Moore*, 288 F.3d 187 (5th Cir. 2002); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Fla. Right to Life v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (affirming *Fla. Right to Life v. Mortham*, No. 98-770CIVORL19A, 1999 WL 33204523 (M.D. Fla. 1999)).

[16] *Conn. v. Proto*, 526 A.2d 1297 (Conn. 1987); *Wash. State Republican Party v. Wash. State Public Disclosure Comm'n*, 4 P.3d 808 (Wash. 2000); *Elections Bd. v. Wisconsin Mfr. & Commerce*, 597 N.W.2d 721 (Wisc. 1999).

the Appellate Court of New York,[17] all of which have held that campaign finance laws that prohibit or regulate the discussion of public issues are unconstitutionally overboad.

3. The "electioneering communication" provision is unconstitutionally overbroad, because it encompasses all means of communications.

Furthermore, the federal electioneering communication provision only applied to broadcast advertising. 2 U.S. § 434(f)(3)(A)(i). Alaska, however, has expanded the definition to also include print, Internet, mail, and phone communications. Alaska Stat. § 15.13.400(3). *McConnell* upheld the regulation of broadcast ads, because of record evidence.[18] Alaska, however, made no such effort, and, as a result, the lower court decision upholding the provision conflicts with the decisions of this Court.

Moreover, the State was required to prove that Alaska left open adequate alternative means of communication, which they failed to do. In *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989), this Court required that the government leave open adequate alternative means of communication when it restricted one means. The federal provision dealt only with broadcast communications, so that groups retained the option of communicating in other ways. But these

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[17] *Klepper v. Christian Coalition*, 259 A.D.2d 926 (N.Y. App. Div. 1999).

[18] *McConnell* explained that the record "explained the reasons" why "Congress found that corporation and unions used soft money to finance a virtual torrent of televised . . . ads." 540 U.S. at 207.

alternative means are gone in Alaska and, as a result, the decision of the court below upholding the provision conflicts with the decisions of this Court.

III. The "Electioneering Communication" provision Conflicts With Decisions of This Court and Decisions of Other Circuits By Being Unconstitutionally Vague.

This Court in *Buckley* and *MCFL* imposed narrowing constructions on various provisions of the Federal Election Campaign Act because the provisions were vague and, as a result, put speakers "wholly at the mercy of the varied understandings of his hearers," with the result that there would be "no security for free discussion." *Buckley*, 424 U.S. at 43.

1. The "electioneering communication" provision upheld in *McConnell v. FEC* was not vague.

This Court, in *McConnell*, found that the federal definition of "electioneering communication" "raise[d] none of the vagueness concerns that drove our analysis in *Buckley*," since the "components [of the federal definition] are both easily understood and objectively determinable," *McConnell*, 540 U.S. at 194 (noting that "we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line." *Id.* at 192.).

2. The "electioneering communication" provision is vague.

Alaska's definition contains many terms that are not "objectively determinable." The federal provision requires naming a "clearly identified candidate," 11 C.F.R. § 100.29(a)(2), which "requires that an explicit

and unambiguous reference to the candidate appear as part of the communication." *Buckley*, 424 U.S. at 43; *see also id.* at 43 n.51. Alaska, however, requires identification of a candidate "directly or indirectly." "Indirectly," however, means "not straightforward and open," *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001), which suggests that "indirect" references need not actually "clearly identify" the candidate. Further, Alaska requires the communication to address "an issue of national, state, or local political importance," which is not "objectively determinable" by the speaker.

Finally, a communication is not an "electioneering communication," if it is deemed an "issue communication." Alaska Stat. § 15.13.400(6)(C). The two differences are that an "issue communication" does not attribute a position on the issue discussed to the identified candidate and "does not support or oppose a candidate." Alaska Stat. § 15.13.400(12). However, "support or oppose" is vague, *Fla. Right to Life v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (affirming *Fla. Right to Life v. Mortham*, No. 98-770CIVORL19A, 1999 WL 33204523 (M.D. Fla. 1999)); *North Carolina Right To Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999),[19] and the vagueness of the exception renders the principal definition vague. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).[20]

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[19] *McConnell* approved the use of these terms as applied to political parties and candidates, but not others, because this Court felt they would have the political expertise to apply the terms. *McConnell*, 540 U.S. at 170 & n.64.

[20] Furthermore, Alaska's scheme also uses phrases that this Court has already construed to require the express advocacy construction because of vagueness. For example, "expenditures"

The First, Second, Fourth, Seventh, and Eighth Circuits,[21] the Supreme Courts of the States of Connecticut, Florida, Indiana, Minnesota, Texas, and Virginia,[22] the Court of Appeals in California,[23] and another panel of the Ninth Circuit[24] have held such vague definitions unconstitutional or narrowly construed them, because they have not encompass only express advocacy, and two Circuits, the Fifth and the

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are defined to be transactions "for the purpose of . . . influencing . . . [an] election," Alaska Stat. § 15.13.400(6)(A), which phrase this Court said required an express advocacy construction. *MCFL*, 479 U.S. at 246 (definition of "expenditure" contained "for the purpose of influencing"), 249 ("an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b").

[21] *Maine Right To Life Comm. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000); *FEC v. Christian Action Network*, 92 F.3d 1178 (4th Cir. 1996) (*CAN I*); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997) (*CAN II*); *Va. Soc'y For Human Life v. Caldwell*, 152 F.3d 268 (4th Cir. 1998); *N.C. Right To Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *Virginia Soc'y for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503 (7th Cir. 1998); *Iowa Right to Life Comm. v. Williams*, 187 F.3d 963 (8th Cir. 1999).

[22] *Conn. v. Proto*, 526 A.2d 1297 (Conn. 1987); *Doe v. Mortham*, 708 So. 2d 929 (Fla. 1998); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E. 2d 135 (Ind. 1999); *Minn. Citizens Concerned for Life v. Kelley*, 698 N.W.2d 424 (Minn. 2005); *Osterberg v. Peca*, 12 S.W.3d 31 (Tex. 2000); *Virginia. Soc'y for Human Life v. Caldwell*, 500 S.E.2d 814 (Va. 1998).

[23] *Governor Gray Davis Committee v. American Taxpayers Alliance*, 125 Cal. Rptr. 2d 534 (Cal. Ct. App. 2002).

[24] *California Pro-Life Council v. Getman*, 328 F.3d 1088 (9th Cir. 2003).

Sixth,[25] and another panel of the Ninth Circuit[26] have held that, in the wake of *McConnell*, the Constitution continues to require the courts to employ the express advocacy test to vague and overbroad statutes. As a result, the decision of the court below, finding the definition of "electioneering communication" was not vague, App. 18a, conflicts with the decisions of this Court and of numerous federal circuits.

IV. The Level of Regulation on Alaska-style "Electioneering Communications" Conflicts with Decisions of this Court and Decisions of Other Circuits.

In addition to broadening the category of expression encompassed by Alaska-style "electioneering communications," Alaska imposes a much greater level of regulation on them.

1. This Court approved only a one-time report for "independent expenditures" in *Buckley* and for "electioneering communications" in *McConnell*.

This Court, in *MCFL* and *McConnell*, approved only one-time reports, disclosing only the expenditures for and contributors to the communication in question, for those that can make federally-defined "independent expenditures" and "electioneering communications." *MCFL*, 479 U.S. at 252-53; *McConnell*, 540 U.S. at 197 n.81. And *Buckley* and *MCFL* rejected the FEC's demand that groups that make "independent expendi-

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[25] *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006); *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004).

[26] *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004).

tures"[27] must comply will all the requirement imposed on a federal PAC, unless their major purpose is the election or nomination of candidates. *Buckley*, 424 U.S. at 79; *MCFL*, 479 U.S. at 262.[28]

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[27]"[T]he FEC maintain[ed] that [an exception] would open the door to massive undisclosed political spending by similar entities, and to their use as conduits for undisclosed spending by business corporations and unions." *MCFL*, 479 U.S. at 262. "We see no such danger," said the Court, noting that simple reporting requirements would alleviate any such danger:

> [A]n independent expenditure of as little as $250 by MCFL will trigger the disclosure provisions of § 434(c). As a result, MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures. These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions. The state interest in disclosure therefore can be met in a manner *less restrictive than* imposing the full panoply of regulations that accompany *status as a political committee* under the Act.

Id. (emphasis added).

[28]As to "political committee" status, *MCFL* followed *Buckley*, concerning the "major purpose" test:

> Furthermore, should MCFL's independent spending become so extensive that the organization's *major purpose* may be regarded as campaign activity, the corporation would be classified as a political committee. See *Buckley*, 424 U.S. at 79. As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns. In sum, there is no need for the sake of disclosure to treat MCFL any differently

2. Alaska unconstitutionally imposes extensive prohibitions and PAC-style requirements on entities making "electioneering communications," like AKRTL, whose major purpose is not the election or nomination of candidates for public office.

Alaska, however, imposes several prohibitions and PAC-style requirements on AKRTL, as explained above.[29] AKRTL does not have the major purpose of nominating or electing candidates. And the facts prove that its major purpose is issue advocacy, VC ¶¶ 13-14, and that its "communications . . . do not expressly advocate the election or defeat of any clearly identified candidate." VC ¶ 22. So it is improper for AKRTL to be treated in the same way that Alaska treats PACs, and it is improper for Alaska to require prior registration and approval, periodic reporting, and entity-destroying termination requirements on non-PACs. Such prohibitions and burdens may not be imposed on organization whose major purpose is not the nomination and election of candidates. As a result, the court's decision below, upholding these PAC-style requirements, conflicts with the decisions of this Court. Further, the Ninth Circuit decision creates a Circuit split with the

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> than other organizations that only occasionally engage in independent spending on behalf of candidates.

MCFL, 479 U.S. at 262 (emphasis added).

[29] The Ninth Circuit recognized that "the 2001 and 2002 amendments extended various disclosure requirements to 'nongroup entities.' As a result, 'nongroup entities' became subject to the same disclosure rules as 'groups.'" App. 8a.

Second, Fourth, Seventh, Eleventh, and D.C. Circuits,[30] another panel of the Ninth Circuit,[31] and the Supreme Court of Indiana,[32] which recognize the "major purpose" test.

Conclusion

For the foregoing reason, this Court should issue the requested writ of certiorari.

Respectfully submitted,

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[30] *United States v. The National Committee for Impeachment*, 469 F.2d 1135 (2nd Cir. 1972); *North Carolina Right To Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *Fla. Right to Life v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (affirming *Fla. Right to Life v. Mortham*, No. 98-770CIVORL19A, 1999 WL 33204523 (M.D. Fla. 1999)); *FEC v. Machinists Non-partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981).

[31] *California Pro-Life Council v. Getman*, 328 F.3d 1088 (9th Cir. 2003).

[32] *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E. 2d 135 (Ind. 1999).

Appendix

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA RIGHT TO LIFE COMMITTEE, *Plaintiff-Appellant,* *v.* BROOKE MILES; ANDREA JACOBSON; LARRY WOOD; MARK HANDLEY; JOHN DAPCEVICH; SHEILA GALLAGHAER, *Defendants-Appellees.*	No. 04-35599 D.C. No. CV-02-00274-A-RRB OPINION

Appeal from the United States District Court
for the District of Alaska
Ralph R. Beistline, District Judge, Presiding

Argued and Submitted
July 12, 2005— Anchorage, Alaska

Filed March 22, 2006

Before: Alfred T. Goodwin, Melvin Brunetti, and William
A. Fletcher, Circuit Judges.

Opinion by Judge William A. Fletcher

[slip opinion Summary and Counsel statements omitted]

OPINION

W. FLETCHER, Circuit Judge:

Alaska Right to Life Committee ("AKRTL") challenges certain aspects of Alaska's campaign finance law, Alaska Stat. § 15.13.030 *et seq*. Prior to the 2002

Alaska gubernatorial election, AKRTL was informed by the Alaska Public Offices Commission that if it wished to engage in "electioneering communications" as a "nongroup entity," it would have to comply with registration, reporting, notification, and disclosure-of-identity requirements. AKRTL brought suit in federal district court based on the First Amendment, seeking declaratory and injunctive relief against these requirements. On cross-motions for summary judgment, the district court upheld the Alaska law. We affirm.

I. Factual and Procedural Background

AKRTL is a nonprofit corporation headquartered in Anchorage, Alaska. It describes itself as "a membership-based association that seeks to promote its pro-life perspective to the Alaska public." It describes its major purpose as promoting "a pro-life consensus in Alaska's public through the presentation of its pro life message." It seeks to accomplish its goals through various forms of communication to the public, including a newsletter, telemarketing, and the Internet. AKRTL states that it is not affiliated with any political party, political candidate, or campaign committee.

AKRTL is affiliated with the Alaska Right to Life Political Action Committee ("AKRTL-PAC") and Alaska Right to Life, Inc. ("AKRTL Inc."). AKRTL-PAC is an advocacy organization, and AKRTL Inc. is a tax-exempt educational organization. The three entities share the same director and the same board of directors. The degree of financial separation among the three entities is unclear from the record. AKRTL-PAC is registered as a "group" with the Alaska Public Offices Commission ("APOC"), which interprets and

enforces Alaska's campaign finance disclosure law. AKRTL is not registered.

Fundraising by AKRTL is primarily accomplished through telemarketing campaigns. In 2002, AKRTL developed a proposed telemarketing campaign costing more than $500 (the monetary threshold under Alaska law) that would mention candidates' names; discuss political issues that were relevant to the then-upcoming gubernatorial election on November 5, 2002; and state the candidates' position on those issues. Specific language that AKRTL planned to use in the campaign was as follows:

> Alaska Right to Life is always on the forefront of implementing pro-life legislation within our state, such as banning partial birth abortion, establishing parental consent and stopping state funding. We believe these are important issues affecting all Alaskans. Frank Murkowski supports Alaska Right to Life's pro-life vision by supporting a ban on partial birth abortion, establishing parental consent and stopping state funding. But Fran Ulmer stands in opposition to these measures. Please be sure to vote.

Frank Murkowski and Fran Ulmer were, respectively, the Republican and Democratic candidates for governor in 2002.

In late September 2002, the Indiana-based lawyer now representing AKRTL made general telephone inquiries to APOC concerning Alaska's campaign finance law without revealing the identity of his client. The same lawyer made two later inquiries, again without identifying his client. Finally, on November 1,

2002, local Alaska counsel provided a draft complaint, signed by AKRTL Inc., to the Alaska Attorney General's office. The local counsel indicated that he planned to file the complaint the next day. The draft complaint asked for a temporary restraining order allowing AKRTL Inc. to engage in a telemarketing campaign prior to the November 5, 2002 election using the above-quoted language.

APOC responded by telephone and letter. The letter, dated November 1, noted that "AkRTL" (by which it appears to have meant AKRTL-PAC) had already registered under the Alaska statute. The letter also noted that the fundraising was intended to benefit "the committee" (by which it appears to have meant AKRTL). APOC approved the proposed communication on the assumption that AKRTL-PAC, which had previously registered with APOC as a "group," would be the entity making the telephone calls. APOC specified that "because the script includes an electioneering communication, the costs must be paid for with group-reported funds."

AKRTL Inc. did not file its proposed complaint on November 2. Instead, on November 4, AKRTL—not AKRTL Inc. or AKRTL-PAC—filed suit in federal district court, naming as defendants Brook Miles, Andrea Jacobson, Larry Wood, Mark Handley, John Dapcevich, and Sheila Gallagher in their official capacities as director and members of APOC (collectively "APOC"). As noted above, AKRTL (unlike AKRTL-PAC) has not registered under Alaska's campaign finance law.

AKRTL challenged five provisions of the Alaska law: (1) the definition of "electioneering communica-

tion"; (2) the requirement that it register before making campaign finance expenditures; (3) the requirement that it make reports; (4) the requirement that it notify contributors and potential contributors that their contributions may be used to influence an election; and (5) the requirement that it disclose in its communications who is paying for the communication. AKRTL contended that these provisions violate the First Amendment both facially and as applied.

The district court granted summary judgment to APOC. AKRTL appealed everything except the district court's approval of the notification requirement for contributors (issue (4), above). We have jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1291. We affirm.

II. Statutory Background

Alaska has a long history of regulating political influence and campaign finance, beginning in 1913 when the Alaska legislature passed a statute requiring lobbyists to register. 1913 Alaska Sess. Law ch. 43 § 1 (1913). In 1974, Alaska adopted a law limiting individual contributions to candidates, limiting the amount of money candidates could spend, and requiring that written receipts for all expenditures promoting candidates that exceeded $100 be filed with the state election commission. 1974 Alaska Sess. Law ch. 76 § 1 (1974).

A 1990 report commissioned by the Alaska State Senate revealed that public confidence and trust in the integrity of the legislature was "disturbingly low" and that this was attributable in part to "calculated evasions of the purpose and spirit of campaign laws." *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 602

(Alaska 1999) ("*AKCLU*") (quoting the report). A former member of the State House of Representatives stated that "the constant refrain I heard from citizens . . . was that the Legislature was owned by special interests [and] that nothing was going to change the corruption caused by big money." *Id.* (internal quotation marks omitted).

In 1996, Alaska passed a comprehensive campaign reform statute, commonly referred to as SB 191. SB 191 contained a finding that "the purpose of this Act [is] to substantially revise Alaska's election campaign finance laws in order to restore the public's trust in the electoral process and to foster good government." Alaska Sess. Law ch. 48 § 1. Under SB 191, independent expenditures by an entity supporting or opposing a candidate for state office were banned unless the entity qualified as a "group." *AKCLU*, 978 P.2d at 607-08. A "group" was defined as "any combination of two or more individuals acting jointly who organize for the principal purpose of influencing the outcome of one or more elections and who take action the major purpose of which is to influence the outcome of an election." *Id.* at 608 n.65. All entities not qualifying as "groups" were banned from making such independent expenditures.

In 1999, the Supreme Court of Alaska upheld most of SB 191 in *AKCLU*. The court upheld the ban on expenditures by what it called "nongroup entities," but only after defining that term narrowly. Guided by the United States Supreme Court's decisions in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990), the Alaska court defined "nongroup entities" as "orga-

nizations potentially able to amass great wealth through state-created advantages." *AKCLU*, 978 P.2d at 611-12. Included in the court's definition of "nongroup entities" were corporations and labor unions. 978 P.2d at 607-08. Excluded from its definition were entities that "(1) . . . cannot participate in business activities, (2) . . . have no shareholders who have a claim on corporate earnings, and (3) . . . are independent from the influence of business corporations." The court held that "nongroup entities," so defined, could constitutionally be banned from making independent expenditures to support or oppose candidates. *Id.* at 612. Entities excluded from the court's definition of "nongroup entities" were not banned by the statute from making such expenditures. *Id.* at 611-12.

A separate challenge to SB 191 was brought in federal district court. The district court stayed proceedings until the Alaska Supreme Court decided *AKCLU*. After that decision became final, the district court ruled on the constitutionality of two provisions of SB 191 that had not been addressed in *AKCLU*. *Jacobus v. State of Alaska*, 182 F. Supp. 2d 881 (D. Alaska 2001). The district court struck down a $5,000 per year limitation on "soft-money" contributions by individuals to political parties, as well as a limitation on professional services volunteered by individuals on behalf of a candidate or ballot proposition when the services were those for which that individual "would ordinarily be paid a fee or wage." *Id.* at 885, 890. On appeal, we upheld the statutory limitation on "soft money" contributions, but struck down the limitation on individual volunteer services. *Jacobus v. State of Alaska*, 338 F.3d 1095, 1107-22, 1122-25 (9th Cir. 2003).

Partly in response to the decisions by the Alaska Supreme Court in *AKCLU* and the federal district court in *Jacobus*, the Alaska legislature significantly amended Alaska's campaign finance law in 2001 and 2002. Preventing corruption and the appearance of corruption, as well as providing information to voters, were cited by various members of the State legislature as compelling interests supporting the amendments. As Representative Jeanette James stated during debates on the amendments, the primary focus of campaign finance laws is to inform the public, and that "wherever there is money involved in affecting policy in the State, either by law or by choice, the public has a right to know."

Among other things, the 2001 and 2002 amendments extended various disclosure requirements to "nongroup entities." As a result, "nongroup entities" became subject to the same disclosure rules as "groups."

The amendments also provided a broad definition of "electioneering communication," thereby closing a loophole that had allowed evasion of disclosure requirements if the use of certain, specified words was avoided in advertisements. This new broad definition was influenced by our description of the "magic words requirement," and its associated problems, in *Federal Election Commission v. Furgatch*, 807 F.2d 857, 863 (9th Cir. 1987):

> A test requiring the magic words "elect," "support," etc., or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating

> the Federal Election Campaign Act. "Independent" campaign spenders working on behalf of candidates could remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate.

Finally, and somewhat confusingly, the amendments essentially adopted as their definition of "nongroup entities" the Alaska Supreme Court's description in *AKCLU* of entities that had been excluded from that court's definition of "nongroup entities" in SB 191. Under *AKCLU*, "nongroup entities" were defined to include only organizations, such as business corporations and labor unions, that were capable of "amassing great wealth" through state-created advantages. "Nongroup entities," so defined, were banned by SB 191 from making independent expenditures. Other entities—neither "groups" nor "nongroup entities"—were permitted to make independent expenditures under SB 191. Now, under the new amendments, those *other* entities were called "nongroup entities." Under the newly adopted Alaska Stat. § 15.13.400(13),

> "nongroup entity" means a person, other than an individual, that takes action the major purpose of which is to influence the outcome of an election, and that
>
> > (A) cannot participate in business activities;
> >
> > (B) does not have shareholders who have a claim on corporate earnings; and

(C) is independent from the influence of business corporations.

A "nongroup entity" under the newly adopted amendments is not banned from making expenditures. "Nongroup entities" are merely required to make various forms of disclosure in connection with their expenditures.

AKRTL's First Amendment challenge is addressed to disclosures now required of "nongroup entities" that make expenditures.

III. Mootness

AKRTL's suit is not moot simply because the 2002 election has come and gone. We have held that "election cases often fall within the 'capable of repetition, yet evading review' exception to the mootness doctrine, because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 n.4 (9th Cir. 2003) (quoting *Porter v. Jones*, 319 F.3d 483, 490 (9th Cir. 2003)) (internal quotation marks and alterations omitted). The provisions of Alaska law challenged by AKRTL remain in place, and there is sufficient likelihood that AKRTL will again be required to comply with them that its appeal is not moot.

IV. Standard of Review

We review the district court's grant of summary judgment de novo. *See Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly

applied the relevant substantive law. *Id.*

V. Discussion

On appeal to this court, AKRTL argues that it cannot be required to make disclosures as a condition of making "expenditures" for "electioneering communications" as those terms are defined under Alaska Stat. §§ 15.13.400(3), (5) and (6). The centerpiece of AKRTL's First Amendment challenge is its argument that the definition of "electioneering communications" is unconstitutionally vague and overbroad. In addition, AKRTL challenges three specific disclosure requirements. First, it challenges the requirement that a "nongroup entity" register under Alaska Stat. § 15.13.050(a) before it can make an "expenditure" under Alaska Stat. § 15.13.067. Second, it challenges the requirement that a nongroup entity report expenditures under Alaska Stat. §§ 15.13.040(d), (e), and (j), 15.13.074(i), 15.13.082(b), 15.13.100, and 15.13.135(a). Third, it challenges the requirement that a nongroup entity disclose under Alaska Stat. §§ 15.13.090 and 15.13.135(b) that it is paying for a communication.

None of the challenged provisions limits the amount of money a nongroup entity such as AKRTL may spend. Rather, the provisions require only that certain forms of disclosure be made. With that in mind, we consider AKRTL's challenges.

A. Definition of "Electioneering Communications"

As a result of the 2001 and 2002 amendments, "nongroup entities" are required to make disclosures in connection with their "expenditures." For example, a nongroup entity "making an expenditure" must register with APOC as required by § 15.13.050; a nongroup

entity making an expenditure is required to make a "full report" of that expenditure under § 15.13.040(d); a nongroup entity is prohibited by § 15.13.067 from making "an expenditure in an election for candidates for elective office" unless it has registered with APOC; a nongroup entity may not make an expenditure unless the source of the expenditure has been disclosed as required by § 15.13.082(b); and a nongroup entity making an "independent expenditure" supporting or opposing a candidate for election to public office is required by § 15.13.135(b) to disclose the source of the expenditure.

An "expenditure" is defined as the transfer of anything of value for the purpose of making "an express communication" or "an electioneering communication." Alaska Stat. § 15.13.400(6)(A) and (C). An "expenditure" does *not* include the transfer of something of value for making "an issues communication." *Id.* at § 15.13.400(6)(C).[1]

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[1]The syntax of the statute is somewhat garbled. The text provides as follows:

(6) *"expenditure"*

(A) *means a purchase or a transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, incurred or made for the purpose of*

(i) influencing the nomination or election of a candidate or of any individual who files for nomination at a later date and becomes a candidate;

(ii) use by a political party;

(iii) the payment by a person other than a candidate or political party of compensation for the personal services of another person that are rendered to a candidate or political party;

The various forms of "communication" referred to in the section defining "expenditure" are defined as follows:

> "[C]ommunication" means an announcement or advertisement disseminated through print or broadcast media, including radio, television, cable, and satellite, the Internet, or through a mass mailing, excluding those placed by an individual or nongroup entity and costing $500 or less and those that do not directly or indirectly identify a candidate or proposition, as that term is defined in AS 15.13.065(c)[.]

Id. at § 15.13.400(3).

> "[E]xpress communication" means a communication that, when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate[.]

Id. at § 15.13.400(7).

> "[E]lectioneering communication" means a communication that

---

> or
>
> (iv) influencing the outcome of a ballet proposition or question;
>
> (B) does not include a candidate's filing fee or the cost of preparing reports and statements required by this chapter;
>
> (C) *includes an express communication and an electioneering communication, but does not include an issues communication*[.]

Alaska Stat. § 15.13.400(6) (emphasis added).

> (A) directly or indirectly identifies a candidate;
>
> (B) addresses an issue of national, state, or local political importance and attributes a position on that issue to the candidate identified; and
>
> (C) occurs within the 30 days preceding a general or municipal election[.]

Id. at § 15.13.400(5).

> "[I]ssues communication" means a communication that
>
> (A) directly or indirectly identifies a candidate and
>
> (B) addresses an issue of national, state, or local political importance and does not support or oppose a candidate for election to public office[.]

Id. at § 15.13.400(12).

AKRTL argues that the definition of "electioneering communication" is unconstitutionally vague and overbroad, both on its face and as applied. The Alaska definition of "electioneering communication" is comparable to the definition of the same term in the federal Bipartisan Campaign Reform Act of 2002 ("BCRA"). "Electioneering communication" is defined under BCRA as any "broadcast, cable, or satellite communication" that

> (I) refers to a clearly identified candidate for Federal office:
>
> (II) is made within—

> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

2 U.S.C. § 434(f)(3)(A)(i). A communication is "targeted to the relevant electorate" if it "can be received by 50,000 or more persons" in the congressional district or state. *Id.* at § 434(f)(3)(C).

The definition of "electioneering communication" under Alaska law is different from the federal definition of that same term in the following respects. First, under Alaska law, the communication must identify a candidate for office "directly or indirectly." Under the federal law, the communication must identify a candidate "clearly." Second, under Alaska law, the communication must "address[] an issue of national, state or local political importance," and must "attribute[] a position on that issue to the candidate." Under federal law, the content of the communication is not specified; however, with the exception of communications referring to candidates for the Presidency and the Vice-Presidency, the communication must be "targeted to the relevant electorate." Third, under Alaska law, the communication must occur within 30 days of any general or municipal election. Under federal law, the

communication must occur within 60 days of a general or comparable election, or within 30 days of a primary or comparable election.

1. Vagueness

We have little trouble concluding that the definition of "electioneering communication" contained in § 15.13.400(15) is not unconstitutionally vague, either facially or as applied. In *McConnell v. Federal Election Commission*, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003), the Supreme Court upheld the federal definition of "electioneering communication" in BCRA against a facial vagueness challenge. The Court did not merely uphold the definition as constitutionally permissible; indeed, because the definition was so obviously constitutional, the Court also did not narrow the definition by judicial construction in order to avoid a constitutional question. The Court wrote:

> We observe that [the] definition of "electioneering communication" raises none of the vagueness concerns that drove our analysis in *Buckley* [*v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)]. The term "electioneering communication" applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. These components are both easily understood and objectively determinable. Thus, the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here.

540 U.S. at 194 (internal citations omitted).

From the standpoint of vagueness, there are only two possibly significant differences between the federal and the Alaska definition of "electioneering communication." First, under the federal definition, the candidate must be identified "clearly." By contrast, under the Alaska definition, the candidate must be identified "directly or indirectly." Second, under the federal definition, the content of the communication is not described beyond what might be implicit in the requirement that the communication be "targeted to the relevant electorate." By contrast, under the Alaska definition, the communication must "address[] an issue of national, state, or local political importance and attribute[] a position on that issue to the candidate identified." We take these two differences in turn.

a. Facial Challenge to Candidate Identification

AKRTL argues that the definition of "electioneering communication" is unconstitutionally vague on its face because the candidate must be identified "directly or indirectly" rather than "clearly," as in the federal definition. Specifically, AKRTL argues that the use of the word "indirectly" is constitutionally fatal. We disagree.

The federal and the Alaska definitions operate in the same way. Under both definitions, if the candidate is identified by the communication, it is an "electioneering communication." Under both definitions, it does not matter how the identification of the candidate takes place. The federal definition specifies no method of identification. The Alaska definition specifies that the method may be direct or indirect; however, since the words "direct and indirect" together describe the complete universe of possible methods of identification,

the Alaska statute has the actual effect of requiring no specific method of identification, just like the federal definition.

If the Alaska definition had only used the word "directly," omitting the word "indirectly," it would have left open the possibility that a communication identifying a candidate would have escaped regulation. As we stated in rejecting the "magic words" approach in our opinion in *Furgatch*,

> A proper understanding of the speaker's message can best be obtained by considering speech as a whole. Comprehension often requires inferences from the relation of one part of speech to another. The entirety may give a clear impression that is never succinctly stated in a single phrase or sentence.

807 F.2d at 863.

The Alaska legislature chose two words—"directly" and "indirectly"—that in combination were well suited to its purpose of regulating campaign communications identifying particular candidates. "Indirectly" is an easily understood word in common English usage. In the context in which it is used, it is neither vague nor difficult to understand. We therefore reject AKRTL's facial vagueness challenge to the definition of "electioneering communication."

b. Facial Challenge to Requirement That the Communication "Address[] an Issue of National, State, or Local Political Importance"

The Alaska definition of "electioneering communication" requires that the communication "address an issue of national, state, or local political importance."

AKRTL argues that this provision of the Alaska's definition is unconstitutionally vague on its face. We disagree.

The challenged provision restricts the scope of the definition so that it covers only certain kinds of communication. By comparison, the only restriction in the federal definition is that the communication be "targeted to the relevant electorate." The Supreme Court in *McConnell* upheld the federal definition against a vagueness challenge, despite the failure to describe the content of an "electioneering communication" except for whatever description might be implicit in the phrase "relevant electorate." In our view, "relevant," as used in the federal definition, is at least as vague a term as the phrase "addresses an issue of national, state, or local political importance," as used in the Alaska definition. In context, the requirement in the federal definition that the communication be targeted to the "relevant electorate" pretty clearly means that the communication must concern some issue of political importance to that electorate. But, of course, "issue" and "political importance" are precisely the words used in the Alaska statute. Those words are accompanied by the words "national, state, or local," but, if anything, those words make the provision less rather than more vague.

c. As-Applied Vagueness Challenge

We also reject AKRTL's as-applied vagueness challenge. An "electioneering communication" as defined under Alaska law, clearly applies to AKRTL's proposed telephone message. That proposed message specifically identifies, by name, the 2002 Republican and Democratic gubernatorial candidates, Frank Murkowski and Fran Ulmer. AKRTL's proposed

communication also clearly addresses an issue of "national, state, or local political importance." Indeed, the proposed communication itself refers to the issues of "banning partial birth abortion, establishing parental consent and stopping state funding," and then states, "We believe these are important issues affecting all Alaskans."

2. Overbreadth

We also have little trouble concluding that the definition of "electioneering communication" is not unconstitutionally overbroad. AKRTL argues that the definition of "electioneering communication" is not restricted to "express advocacy" or its functional equivalent, and that "electioneering communication" under Alaska law can be interpreted to include "issue advocacy." AKRTL further argues that if the definition of "electioneering communication" includes "issue advocacy," the definition is unconstitutionally overbroad. We disagree.

a. Facial Overbreadth

AKRTL's argument is based on the Supreme Court's analysis of the Federal Election Campaign Act of 1971 in *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). In *Buckley*, the Court construed a provision of the Act that limited expenditures "relative to a clearly identified candidate" to $1,000 per year. 18 U.S.C. § 608(e)(1) (1970 ed., Supp. IV). Influenced by the First Amendment, the Court construed that provision to apply only to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44. Employing what have later been called "magic words," the Court noted that

the limitation on expenditures applied only to expenditures for communications "containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'". *Id.* at 44 n.52.

In *McConnell*, the Supreme Court retreated from its statements in *Buckley*. Plaintiffs in *McConnell* challenged the federal definition of "electioneering communication" in BCRA, arguing "that *Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an invaluable First Amendment right to engage in the latter category of speech." 540 U.S. at 190. The Court in *McConnell* emphasized that the distinction drawn in *Buckley* between "express advocacy" and "so-called issue advocacy" was not constitutionally compelled, but was rather "the product of statutory interpretation rather than a constitutional command." *Id.* at 192. "In short, the concept of express advocacy and the concomitant class of magic words were born of an effort to avoid constitutional infirmities." *Id.*

Despite the Court's retreat from *Buckley* in *McConnell*, AKRTL argues that Alaska's definition of "electioneering communications" is overbroad because it includes "issue advocacy." We disagree for two reasons.

First, AKRTL is incorrect in arguing that "issue advocacy" is included in the Alaska definition of "electioneering communications." Under Alaska's law, "electioneering communications" have a distinct and non-overlapping definition from "issues communications." The disclosure requirements to which AKRTL

objects are triggered only by an expenditure that supports an "express communication" or an "electioneering communication." Alaska Stat. § 15.13.400(6)(C). The disclosure requirement is *not* triggered by an expenditure that supports an "issues communication." *Id.* The statute states explicitly, "Expenditure" . . . includes an express communication and an electioneering communication, *but does not include an issues communication.*" *Id.* (emphasis added).

Under the Alaska law, an "issues communication" is defined as "a communication that (A) directly or indirectly identifies a candidate; and (B) addresses an issue of national, state, or local political importance *and does not support or oppose a candidate* for election to public office." *Id.* at § 15.13.400(12) (emphasis added). This definition of "issues communication" is fully consistent with *Buckley*'s definition of "issues advocacy." Even if we were to agree with AKRTL's argument that issue advocacy cannot constitutionally come within the definition of "electioneering communication," we would be compelled by the plain words of the Alaska statute to conclude that "issue advocacy" is not included within that definition.

Second, as the Supreme Court noted in *McConnell*, the line between express and issues advocacy is, in any event, not constitutionally compelled. In construing the federal definition of "electioneering communication" under BCRA, the Court upheld the constitutionality of the definition without applying the *Buckley* distinction between the two kinds of advocacy. The Court wrote:

> Nor are we persuaded . . . that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy.

> That notion cannot be squared with our long-standing recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad. . . . Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election. *Buckley*'s express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws in the existing system.

540 U.S. at 193-94 (footnote omitted); *see also ACLU of Nev. v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004) ("After *McConnell*, the line between 'express' and all other election-related speech is not constitutionally material[.]").

b. Overbreadth as Applied

Alaska's definition of "electioneering communications" as applied to AKRTL's proposed telephone message is not unconstitutionally overbroad as applied to AKRTL's proposed telephone message. That proposed message refers to several issues concerning abortion, ascribes positions on those issues to the two gubernatorial candidates, and urges the listener to vote. Under any reasonable understanding of that message, the listener is being urged to vote for or against these two candidates based on the positions described in the message. Such a message is clearly

regulable under both *Buckley* and *McConnell*.

B. Disclosure Requirements

AKRTL challenges three different kind of disclosures that a "nongroup entity" must make if it wishes to make an "electioneering communication." First, the entity must register with APOC. Second, the entity must report expenditures. Third, the entity must disclose that it is paying for its communications.

AKRTL argues that these disclosure requirements violate its First Amendment rights. In part its argument depends on its contention—which we have just rejected—that the definition of "electioneering communication" is unconstitutionally vague and overbroad. But in part its argument depends on a free-standing contention that because it is an "*MCFL* organization," as described in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986) ("*MCFL*"), it is protected by the First Amendment from having to make such disclosures.

We agree with AKRTL that it is a "nongroup entity" under Alaska law, and that such an entity is an *MCFL* organization. We also agree that *MCFL* organizations have greater protections under the First Amendment than traditional business corporations. However, we disagree with AKRTL's contention that Alaska's disclosure requirements violate the First Amendment rights of an *MCFL* organization.

1. *MCFL* Organizations

We begin our analysis with a description of the Supreme Court's holding in *MCFL*. Massachusetts Citizens for Life, Inc. ("MCFL"), a nonprofit, nonstock

corporation, brought a First Amendment challenge to a provision of the Federal Election Campaign Act of 1974, 2 U.S.C. § 441b. Section 441b imposed certain requirements on all corporations making expenditures "in connection with" any federal election. Among other things, § 441b required that campaign expenditures not come from money in the corporation's general fund. Instead, such expenditures had to come from a separate, segregated fund. The money in that fund could come only from voluntary contributions "earmarked for that purpose by the donors." *Id.* at 252.

In its majority opinion, the Court distinguished between a "traditional corporation organized for economic gain" and a corporation like MCFL. *Id.* at 259. In the Court's view, a traditional corporation—an "organization that amasses great wealth in the marketplace," *id.* at 263—may be regulated to a greater extent. The Court defined a corporation like MCFL as having three critical features: First, it "was formed for the express purpose of promoting political ideas, and cannot engage in business activities." Second, it has no shareholders or other affiliated persons with "a claim on assets or earnings." Third, it "was not established as a business corporation or labor union, and it is its policy not to accept contributions from such organizations." *Id.* at 263-64.

The Court majority in *MCFL* construed § 441b to apply only to expenditures and contributions for "express advocacy." *Id.* at 249. It then held that an organization meeting the above criteria could not constitutionally be required to maintain a separate, segregated fund containing money specifically solicited for campaign contributions. It wrote, "The limitation on solicitation in this case . . . means that nonmember

corporations can hardly raise any funds at all to engage in political speech warranting the highest constitutional protection." *Id.* at 260. The Court held that the limitation contained in § 441b could not be constitutionally applied to corporations meeting the *MCFL* criteria because it was too "broad [a] prophylactic rule." *Id.*

The Federal Election Commission ("FEC") had advanced two primary justifications for applying § 441b to *MCFL*. First, the FEC had argued that MCFL-type organizations might use an individual's money for purposes not supported by that individual. It contended that "even if contributors may be aware that a contribution to appellee will be used for political purposes in general, they may not wish such money to be used for electoral campaigns in particular." *Id.* at 261. The Court majority responded by noting that this concern could be met "by means far more narrowly tailored and less burdensome," simply by "requiring that contributors be informed that their money may be used for such a purpose." *Id.* Second, the FEC had argued that if the requirements of § 441b were not applicable to MCFL, this "would open the door to massive undisclosed political spending by similar entities, and to their use as conduits for undisclosed spending by business corporations and unions." *Id.* at 262. The majority responded by noting that whatever interest the government had in disclosure was satisfied by another, unchallenged provision of the statute under which MCFL was required to report information about independent expenditures "of as little as $200." *Id.* The Court therefore concluded that the FEC had not advanced a "*compelling* state interest" sufficient to justify the application of § 441b to MCFL. *Id.* at 263

(emphasis in original).

2. Degree of Scrutiny

The degree of scrutiny that we must apply to Alaska's disclosure requirements for "nongroup entities" is somewhat unclear. In *Buckley*, the Court applied "exacting scrutiny" to various disclosure requirements in the Federal Election Campaign Act, including disclosures of contributions as small as $11 or $101 to minor-party and independent candidates, and disclosures "by those who make independent contributions and expenditures." *Buckley*, 424 U.S. at 61-62; *see also id.* at 44-45 ("The constitutionality of § 608(e)(1) turns on whether the governmental interests advanced in its support satisfy the *exacting scrutiny* applicable to limitations on core First Amendment rights of political expression." (emphasis added)). "Exacting scrutiny," in the words of *Buckley*, required that a "substantial relation" be shown "between the governmental interest and the information required to be disclosed." *Id.* at 64. This "exacting scrutiny" standard in *Buckley* was later characterized by the Court as requiring that a restriction on corporate political expenditures be "narrowly tailored to serve a compelling state interest." *Austin*, 494 U.S. at 657 (citing *Buckley*, 424 U.S. at 44-45).

In *McConnell*, the Court appears to have relaxed the degree of scrutiny. It explicitly applied a less exacting scrutiny to campaign contributions. It wrote:

> Because the electoral process is the very means through which a free society democratically translates political speech into concrete governmental action, contribution limits, like other measures aimed at protecting the integ-

> rity of the process, tangibly benefit public participation in political debate. For that reason, when reviewing Congress' decision to enact contribution limits, there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words "strict scrutiny."

540 U.S. at 137 (internal quotation marks and citations omitted). The Court was not as explicit about the appropriate standard of scrutiny with respect to disclosure requirements. However, in addressing extensive reporting requirements applicable to money gathered and disbursed to finance "electioneering communications" (as that term is defined in BCRA), the Court did not apply "strict scrutiny" or require a "compelling state interest." *See id.* at 194-95 (describing disclosure requirements). Rather, the Court upheld the disclosure requirements as supported merely by "important state interests." *Id.* at 196 ("We agree with the District Court that the *important state interests* that prompted the *Buckley* Court to uphold FECA's disclosure requirements . . . apply in full to BCRA." (emphasis added)). In the Court's view, those "important state interests" "amply supported application of [the] disclosure requirements to the entire range of 'electioneering communications." *Id.*

In our recent opinion in *Heller*, relying on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995), we applied strict scrutiny in deciding a facial challenge to a state law requiring "persons paying for or 'responsible for paying for' the publication of 'any material or information relating to an election candidate or any question on a ballot' to identify their names and addresses on 'any

[published] printed or written matter or any photograph." 378 F.3d at 981-82. We noted that *McConnell* "casts new light" on some aspects of First Amendment protections of election-related speech, but we concluded that "nothing in *McConnell* undermines *McIntyre*'s understanding that proscribing the *content* of an election communication is a form of regulation of campaign activity subject to traditional strict scrutiny." *Id.* at 987.

In some respects, the disclosure requirements in the case now before us resemble the disclosure requirements at issue in *McConnell*. In other respects—in particular the requirements of Alaska Stat. §§ 15.13.090 and 15.13.135(b) that the identity of a person paying for a "communication" be disclosed—they resemble those at issue in *Heller*. For purposes of this opinion we will assume without deciding that strict scrutiny applies to all of the challenged disclosure requirements, and that Alaska must advance a "compelling state interest" to justify them. Even under this standard, we hold that Alaska's disclosure requirements are justified.

3. Three Forms of Required Disclosure

The three forms of challenged disclosure are registration, reporting, and disclosure of who is paying for a communication. We first address AKRTL's facial challenge. We then address its as-applied challenge.

a. Facial Challenge to Disclosure Requirements

i. Registration

A nongroup entity must comply with the registration requirements of Alaska Stat. §§ 15.13.050(a) and 15.13.067 before it can make an expenditure in support

of or in opposition to a political candidate. Section 15.13.050(a) provides:

> Before making an expenditure in support of or in opposition to a candidate . . . each person other than an individual shall register, on forms provided by the commission, with the commission.

The registration form provided by APOC in connection with § 15.13.050(a) is two pages long. It asks for basic information, such as a nongroup entity's name, its purpose, the names and contact information of its officers, its campaign plans, and banking information if it plans to raise more than $5,000.

Section 15.13.067 provides:

> Only the following may make an expenditure in an election for candidates for elective office:
>
> (1) the candidate;
>
> (2) an individual;
>
> (3) a group that has registered under AS 15.13.050; and
>
> (4) a nongroup entity that has registered under AS 15.13.050.

The provision of this section covering a nongroup entity was added to the Alaska campaign finance law as part of the 2001 and 2002 amendments.

The registration requirements of Alaska Stat. §§ 15.13.040(a) and 15.13.067 are not significantly burdensome in themselves. They are only burdensome to the extent that they trigger the reporting and disclosure-of-who-is-paying requirements applicable

once a nongroup entity has registered. We therefore postpone our consideration of burdens, and the state's justification for imposing them, to our consideration of these requirements.

ii. Reporting

AKRTL challenges the following reporting requirements with which a nongroup entity must comply once it has registered.

First, AKRTL challenges Alaska Stat. §§ 15.13.040(d), (e), and (j),[2] which require a nongroup

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[2]The full text of § 15.13.040(d), (e), and (j) is as follows:

(d) Every individual, person, nongroup entity, or group making an expenditure shall make a full report of expenditures, upon a form prescribed by the commission, unless exempt from reporting. (e) The report required under (d) of this section must contain the name, address, principal occupation, and employer of the individual filing the report, and an itemized list of expenditures. The report shall be filed with the commission no later than 10 days after the expenditure is made.

. . .

(j) Except as provided in (l) of this section [setting forth reporting requirements when fund-raising nets contributions under $50 each], each nongroup entity shall make a full report in accordance with AS 15.13.110 upon a form prescribed by the commission and certified by the nongroup entity's treasurer, listing

(1) the name and address of each officer and director of the nongroup entity;

(2) the aggregate amount of all contributions made to the nongroup entity for the purpose of influencing the outcome of an election;

(3) for all contributions described in (2) of this subsection, the name, address, date, and amount contributed by each contributor and, for all contri-

entity making an expenditure to make a "full report" of that expenditure on a form provided by APOC no later than ten days after the expenditure is made. The report must contain the name, address, principal occupation, and employer of the individual filing the report, and an "itemized list" of expenditures (§ 15.13.040(c) and (d)). Further, a nongroup entity must make a "full report," at intervals prescribed by § 15.13.110, listing the name and address of each officer and director of the entity (§ 15.13.040(j)(1)); the aggregate amount of all contributions made to the entity for the purpose of influencing the outcome of the election (§ 15.13.040(j)(2)); the name, address, date, and

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butions described in (2) of this subsection in excess of $250 in the aggregate during a calendar year, the principal occupation and employer of the contributor; and

(4) the date and amount of all contributions made by the nongroup entity, and, except as provided for certain independent expenditures in AS 15.13.135(a), all expenditures made, incurred, or authorized by the nongroup entity, for the purpose of influencing the outcome of an election; a nongroup entity shall report contributions made to a different nongroup entity for the purpose of influencing the outcome of an election and expenditures made on behalf of a different nongroup entity for the purpose of influencing the outcome of an election as soon as the total contributions and expenditures to that nongroup entity for the purpose of influencing the outcome of an election reach $500 in a year and for all subsequent contributions and expenditures to that nongroup entity in a year whenever the total contributions and expenditures to that nongroup entity for the purpose of influencing the outcome of an election that have not been reported under this paragraph reach $500.

amount contributed by each contributor to the entity, and, for contributions by a particular contributor exceeding an aggregate of $250 in any calendar year, the principal occupation and employer of that contributor (§ 15.13.040(j)(3)); and the date and amount of all contributions made by the entity, and, except for certain independent expenditures, all expenditures made by the entity for the purpose of influencing the outcome of an election (§ 15.13.040(j)(4)).

Second, AKRTL challenges Alaska Stat. § 15.13.074(i), which requires a nongroup entity to notify a potential contributor of the purpose to which his contribution may be used if that contribution is to be to influence the outcome of an election.

Third, AKRTL challenges Alaska Stat. § 15.13.082(b), which provides that a "nongroup entity may not make an expenditure unless the source of the expenditure has been disclosed by this chapter."

Fourth, AKRTL challenges Alaska Stat. § 15.13.110,[3] which specifies the deadlines for filing

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[3]In relevant part, the text of § 15.13.110 provides:

(a) Each candidate, group, and nongroup entity shall make a full report in accordance with AS 15.13.040 for the period ending three days before the due date of the report and beginning on the last day covered by the most recent previous report. If the report is a first report, it must cover the period from the beginning of the campaign to the date three days before the due date of the report. If the report is a report due February 15, it must cover the period beginning on the last day covered by the most recent previous report or on the day that the campaign started, whichever is later, and ending on February 1 of that year. The report shall be filed

(1) 30 days before the election; however, this report

reports with APOC.

Finally, AKRTL challenges Alaska Stat. § 15.13.135(a),[4] which requires a nongroup entity mak

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is not required if the deadline for filing a nominating petition or declaration of candidacy is within 30 days of the election;

(2) one week before the election;

(3) 105 days after a special election; and

(4) February 15 for expenditures made and contributions received that were not reported previously

. . . .

(b) Each contribution that exceeds $250 and that is made within nine days of the election shall be reported to the commission by date, amount, and contributor within 24 hours of receipt by the candidate, group, campaign treasurer, or deputy campaign treasurer. Each contribution to a nongroup entity for the purpose of influencing the outcome of an election that exceeds $250 and that is made within nine days of the election shall be reported to the commission by date, amount, and contributor within 24 hours of receipt by the nongroup entity.

. . .

(f) During the year in which the election is scheduled, each of the following shall file the campaign disclosure reports in the manner and at the times required by this section:

. . .

(4) a group or nongroup entity that receives contributions or makes expenditures on behalf of or in opposition to a person described in (1)-(3) of this subsection [e.g., an individual running for governor][.]

[4]The full text of § 15.13.135(a) is as follows:

Only an individual, group, or nongroup entity may make an independent expenditure supporting or opposing a candidate for election to public office. An independent

ing an independent expenditure supporting or opposing a candidate to make reports under Alaska Stat. §§ 15.13.040 and 15.13.110, provided that the entity's annual operating budget is more than $150.

We conclude that these reporting requirements survive strict scrutiny. In *Buckley*, the Court wrote that in determining whether a state's interests in regulating campaign contributions and expenditures "are sufficient to justify the requirements we must look to the extent of the burden that they place on individual rights." 424 U.S. at 68. For several reasons, we believe that the burdens imposed on nongroup entities by these requirements are not particularly onerous.

First, the challenged provisions require only reporting of contributions to, and of contributions and expenditures by, a nongroup entity. The provisions in no way limit the amount that may be contributed to, or spent by, the entity.

Second, unlike the provisions at issue in *MCLF*, the challenged provisions do not "mean that [nongroup entities] can hardly raise any funds at all to engage in political speech[.]" *Massachusetts Citizens for Life, Inc.*, 479 U.S. at 260. There is no allegation in this case that the reporting provisions limit the fundraising ability of nongroup entities.

Third, unlike the provisions at issue in *MCLF*, the challenged provisions are not "broad prophylactic

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expenditure supporting or opposing a candidate for election to public office, except an independent expenditure made by a nongroup entity with an annual operating budget of $250 or less, shall be reported in accordance with AS 15.13.040 and 15.13.100-15.13.110 and other requirements of this chapter.

rule[s]" that require structural changes in a nongroup entity, such as the segregated fund requirement imposed by § 441b of the Federal Election Campaign Act of 1974. *Id.* at 260. Instead, the challenged provisions are very much like those that the Court suggested in *MCLF* as alternative means by which Congress could permissibly accomplish its aims. For example, Alaska Stat. § 15.13.074(i) requires a nongroup entity to notify a potential contributor of the political purpose to which his contribution may be used. This provision corresponds almost exactly to the Court's suggestion in *MCLF* that Congress could "require that contributors be informed that their money may be used for [electoral campaigns]." *Id.* at 261. Further, the reporting requirements of Alaska Stat. §§ 15.13.040(d), (e) and (j), 15.13.082(b), 15.13.110, and 15.13.135(a) are very much the like the unchallenged reporting requirements in *MCLF*. The Court in *MCLF* pointed to those requirements as accomplishing the aims of Congress more precisely than the "broad prophylactic rule" of § 441b that it held unconstitutional. *Id.* at 262.

In light of the nature of the burdens imposed on a nongroup entity by Alaska's registration and reporting requirements, we hold that these requirements are justified by compelling state interests. As stated by the Court in *Buckley*, those interests are, first, providing "the electorate with information as to where political campaign money comes from and how it is spent . . . in order to aid the voters in evaluating those who seek . . . office"; second, "deterring actual corruption and avoiding the appearance of corruption by exposing large contributors and expenditures to the light of publicity"; and, third, imposing "recordkeeping, report-

ing, and disclosure requirements [as] an essential means of gathering the data necessary to detect violations" of the campaign finance law. *Buckley*, 424 U.S. at 66-68 (internal quotation marks omitted). Or, as stated more succinctly by the Court in *McConnell*, those interests are "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196.

We therefore hold that the reporting provisions of Alaska Stat. §§ 15.13.040(d), (e), (j), 15.13.074(i), 15.13.082(b), 15.13.110, and 15.13.135(a) are constitutional.

iii. Disclosure of Who Pays for a Communication

Once registered, a nongroup entity must also comply with two provisions requiring that it disclose who is paying for a communication. AKRTL challenges both provisions.

First, Alaska Stat. § 15.13.090 requires that most campaign communications be accompanied by a statement indicating who financed the communication. Specifically, it provides:

> (a) All communications shall be clearly identified by the words "paid for by" followed by the name and address of the candidate, group, nongroup entity, or individual paying for the communication. In addition, candidates and groups may identify the name of their campaign chairperson.
>
> (b) The provisions of (a) of this section do not apply when the communication

> (1) is paid for by an individual acting independently of any group or nongroup entity and independently of any other individual;
>
> (2) is made to influence the outcome of a ballot proposition as that term is defined by AS 15.13.065(c); and
>
> (3) is made for
>
> > (A) a billboard or sign; or
> >
> > (B) printed material other than an advertisement made in a newspaper or other periodical.

As defined by § 15.13.400(3), a "communication" means an "announcement or advertisement" that "directly or indirectly identifies a candidate or proposition[.]"

Second, Alaska Stat. § 15.13.135(b) requires much the same kind of disclosure as § 15.13.090 for "independent expenditures." Specifically, it provides:

> (b) An individual, group, or nongroup entity who makes independent expenditures for a mass mailing, for distribution of campaign literature of any sort, for a television, radio, newspaper, or magazine advertisement, or any other communication that supports or opposes a candidate for election to public office
>
> (1) shall comply with AS 15.13.090; and
>
> (2) shall place the following statement in the mailing, literature, advertisement, or other communication so that it is readily and easily discernible:

> This NOTICE TO VOTERS is required by Alaska law. (I/we) certify that this (mailing/literature/advertisement) is not authorized, paid for, or approved by the candidate.

In effect, both provisions require that voters be informed of the source and nature of funding for campaign communications. Section 15.13.090 requires, with certain specified exceptions, that communications be accompanied by such information. Section 15.13.135(b) requires that, in addition to complying with § 15.13.090, communications supporting a candidate paid for by independent expenditures must notify voters that the candidate did not authorize or pay for the communication.

AKRTL does not argue that Alaska Stat. §§ 15.13.090 and 15.13.135(b) require disclosures for communications whose anonymity is protected under *McIntyre*, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995), and *Heller*, 378 F.3d 979 (9th Cir. 2004). AKRTL's challenge is quite narrow. It only argues that to the degree disclosure of its identity is required for "issue advocacy" communications or their "functional equivalent," there is no compelling state interest that would justify such a requirement. We disagree for two reasons.

First, as discussed above, the Court held in *McConnell* that the line drawn in *Buckley* between express and issue advocacy is not constitutionally compelled. Second, even if there were some relevant protection of issue advocacy, and even if disclosures of the nongroup entity's identity were required in connection with such issue advocacy, there is a compelling

state interest justifying such a requirement.

Leaving aside *McIntyre*-type communications which are not implicated by the Alaska law, we believe that there is a compelling state interest in informing voters who or what entity is trying to persuade them to vote in a certain way. The Court in *McConnell* quoted approvingly from the opinion of the district court in justifying a requirement in BCRA that the identity of a corporation or labor union funding "purported 'issue ads'" be disclosed to the voters. The district court had written,

> Plaintiffs [who object to the disclosure requirement] never satisfactorily answer the question of how "uninhibited, robust, and wide-open" speech can occur when organizations hide themselves from the scrutiny of the voting public . . . . Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests in individual citizens seeking to make informed choices in the political marketplace.

540 U.S. at 197 (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)). We understand the reasons given by the Court in *MCFL* for differentiating between corporations and labor unions, on the one hand, and so-called MCFL organizations, on the other, when substantial burdens on raising or spending money for political speech are at issue. But we do not believe that those reasons apply when disclosure of the entity funding a campaign communication is at issue. "Individual citizens seeking to make informed choices

in the political marketplace," *id.*, have an equal need to know what entity is funding a communication, whether that entity is a corporation, a labor union, or a "nongroup entity" as defined under Alaska law.

We therefore conclude that the compelling state interests of "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions," *McConnell*, 540 U.S. at 196, justify the application of Alaska Stat. §§ 15.13.090 and 15.13.135(b) to nongroup entities.

b. As-Applied Challenge to Disclosure Requirements

In *McConnell*, the Court rejected plaintiffs' as-applied challenges to disclosure requirements in BCRA because the plaintiffs had not presented evidence in the district court establishing the "requisite 'reasonable probability' of harm" to persons making the required disclosures. 540 U.S. at 199. In this case, as in *McConnell*, AKRTL has not shown a "reasonable probability' of harm," in the sense intended in *McConnell*, as a result of its being required to make the disclosures required under the Alaska campaign law. We therefore reject its as-applied challenge.

VI. Conclusion

For the foregoing reasons, we conclude that the challenged provisions of Alaska's campaign finance law are constitutional, both facially and as applied to AKRTL. We therefore AFFIRM the decision of the district court.

AFFIRMED.

[Filemarked June 4, 2004]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALASKA RIGHT TO LIFE COMMITTEE, Plaintiff, vs. BROOKE MILES, in her official capacity as Director of the Alaska Public Offices Commission; ANDREA JACOBSON, LARRY WOOD, MARK HANDLEY, JOHN DAPCEVICH, SHEILA GALLAGHER, in their official capacities as members of the Alaska Public Offices Commission, Defendants.	Case No. A02-0274 CV (RRB) **ORDER DENYING PLANTIFF'S MOTION FOR SUMMARY JUDGEMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT**

I. INTRODUCTION

Before the Court are cross-motions for summary judgement, wherein Plaintiff Alaska Right to Life Committee ("Plaintiff")

> challenges five components of Alaska's campaign finance disclosure statutes: the definition of electioneering; the requirement that groups and nongroup entities register before making campaign expenditures; the reporting

> requirements applicable to groups and nongroup entities; the requirement that nongroup entities notify their contributors that contributions may be used to influence an election; and the requirement that groups; nongroup entities, and , some individuals, identify who is paying for the communications.[1]

Specifically, Plaintiff claims that the aforesaid statutes suffer from "constitutional infirmity due to [their] over breadth [and/or because their] expansive reach regulates issue advocacy."[2]

In opposition, Defendant Brook Miles, in her official capacity as Director of the Alaska Public Offices Commission, and Defendants Andrea Jacobson, Larry Wood, Mark Handley, John Dapcevich, and Sheila Gallagher, in their official capacities as members of the Alaska Public Offices Commission (hereinafter collectively referred to as "Defendants") argue: (1) there is no genuine issue of material fact; (2) the statutes as issue are tailored to meet the State's purposes, and are neither vague nor over broad; and (3) given Plaintiff's approach, "a determination that Alaska can regulate electioneering communications of non-group entities such as [Plaintiff] should be dispositive of [Plaintiff's] challenges."[3] Defendants are correct. Because "express advocacy may be determined by looking at communication 'as a whole' and by giving some consideration to

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[1] Clerk's Docket No. 20 at 38-39 (citation omitted).

[2] Clerk's Docket No. 15 at 14.

[3] Clerk's Docket No. 20 at 39.

context,[sic]"[4] For the reasons set forth in Defendants' Supplemental Brief (Docket 49), Defendants are entitled to judgement as a matter of law.[5]

II. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgement should be granted if there is no genuine dispute as to material facts and if the moving party is entitled to judgement as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact.[6] The moving party need not present evidence; it need only point out the lack of any genuine dispute as to material fact.[7] Once the moving party has met this burden, the nonmoving party must set forth evidence of specific facts showing the existence of a genuine issue for trial.[8] All evidence presented by the non-movant must be believed for purposes of summary judgement, and all justifiable inference must be drawn in favor on the non-movant.[9] However, the nonmoving party may not rest upon mere allegations or denials, but must show that there is sufficient evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the

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[4] Clerk's Docket No. 33 at 4 (citing California Pro-Life Council, Inc. v. Getman, 32B F. 3d 1088, 1098 (9th Cir. 2003).

[5] This case is not about the abortion issue and/or the myriad of political controversies which surround the same.

[6] Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

[7] Id. at 323-325.

[8] Anderson v. Libery Lobby, Inc., 477 U.S. 242, 248-9 (1986).

[9] Id. at 255.

truth at trial.[10]

III. DISCUSSION

While it is possible that the provisions of the Alaska Campaign Disclosure Law which Plaintiff challenges were not drafted as precisely as they possibly could have been,[11] they are neither overbroad nor unconstitutionally vague.[12] Indeed, any existing vagueness contained within the statutes at issue falls well short of "chilling substantial amount of legitimate expression."[13] And, when read in conjunction with the U.S. Supreme Court's recent decision in McConnell v. Federal Election Com'n, 124 S. Ct. 619 (2003), the Court has little difficulty in concluding that the statutes at issue pass constitutional muster. Nevertheless, as the parties have focused the brunt of their arguments on the definition of "electioneering communica-

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[10] Id. at 248-9.

[11] Plaintiff challenges Alaska Stat. §§ 15.13.040(d), (e), (j) & (k); 15.13.050; 15.13.067; 15.13.074 (i); 15.13.082 (b); 15.13.090; 15.13.110; 15.13.135; and 15.13.400 (4) (C), (7), (13) & (14) (2000). See also Clerk's Docket No. 49 at 3 & n.1 for a brief description of each of the challenged statutes.

[12] Like the McConnell Court, this Court finds that the "definition of 'electioneering communication' raises none of the vagueness concerns that drove [the U.S. Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1 (1976)]." McConnell v. Federal Election Com'n, 124 S. Ct. 619, 689 (2003).

[13] See California Teachers Association v. State Bd. Of Educ., 271 F. 3d 1141, 1151-52 (9th cir. 2001) (citations omitted); wherein, the Court concluded: (1) that any vagueness "does not result in the chilling of a substantial amount of legitimate expressions"; and (2) that "uncertainty at a statute's margins will not warrant facial invalidation if it is clear that what the statute proscribes 'in the vast majority of its intended applications.'"

tion," the Court examines the same more closely.

Alaska Stat. § 15.13.400 (14) (2000) defines an "electioneering communication" as

> a communication that (A) directly of indirectly identifies a candidate; (B) addresses as issue of national, state, or local political importance and attributes a position on that issue to the candidate identified; and (C) occurs within 30 days preceding a general or municipal election.

Plaintiff claims the definition "sweeps broadly, subjecting Plaintiff's issue advocacy communications to accompanying unconstitutional regulations," i.e., that the statute is unconstitutionally vague.[14] Defendants oppose and argue, in conjunction with the U.S. Supreme Court's findings in McConnell v. Federal Election Com'n, 124 S. Ct. 619 (2003), that the "components [of the state's definition] are both easily understood and objectively determinable."[15] Defendants further contend that, even if there is some uncertainty with respect to the this particular statute, as well as the other statutes at issue, "uncertainty as statute's margins will not warrant facial invalidation if it is clear what the statute proscribes in the vast majority of its intended applications."[16] Defendants' argument is well taken.

It is evident that a segment of the language con-

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[14] Clerk's Docket No. 15 at 3.

[15] McConnell v. Federal Election Com'n, 124 S. Ct. 619, 689 (2003) (citation omitted).

[16] Clerk's Docket No. 49 at 10 (citing California Teachers Association v. State Bd. Of Educ., 271 F. 3d 1141, 1151 (9th Cir. 2001)).

tained in Alaska Stat. § 15.13.300 (14) (2000), i.e., a communication that "(A) directly of indirectly identifies a candidate," (emphasis added) is not as precise as the language contained within the statute(s) examined in McConnell v. Federal Election Com'n, 124 S. Ct. 619, 689 (2003); wherein, the term "electioneering communication" applied only to a broadcast clearly identifying a candidate for federal office. While this does concern the Court, the vagueness, if any, "does not result in the chilling of a substantial amount of legitimate expression."[17] As a result, the Court concludes Alaska Stat. § 15.13.400 (14) (2000), in particular, is neither vague nor overbroad.

Even under a "compelling interest" test, the Court further concludes: (1) that McConnell, when read in conjunction with the record clearly "indicates that the provisions [Plaintiff] challenges are overbroad"[18]; and (2) that the state has an important and compelling interest in the challenged statutes; whereby, there is no substantial burden on protected speech.[19]

IV. CONCLUSION

Having studied the parties' well-articulated plead-

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[17] California Teachers Association v. State Bd. of Educ., 271 F. 3d 1141, 1152 (9th Cir. 2001).

[18] Clerk's Docket No. 49 at 14-16.

[19] Plaintiff's arguments with respect to mailings mentioning "that a particular city was the hometown of the governor," wedding announcements, etc., Clerk's Docket No. 48 at 11, adds little to the weight of its argument. Indeed, the meaning and/or intent of Alaska's campaign finance statutes is clear. Moreover, it's hard to imagine that any court would not dismiss such frivolous and/or nonsensical claims - with little or no argument. Certainly, this Court would dismiss the same - post haste.

ings, in conjunction with the U.S. Supreme Court's most recent decision in McConnell v. Federal Election Commission, 124 S. Ct. 619 (2003), Plaintiff's Motion for Summary Judgment (Docket No. 15) is hereby **DENIED**, Defendants' Motion for Summary Judgment (Docket No. 33) is hereby **GRANTED** and this matter is hereby dismissed in its entirety.

ENTERED at Anchorage, Alaska, this 2 day of June, 2004.

/s/
RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

[filemarked May 1, 2006]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALASKA RIGHT TO LIFE COMMITTEE, Plaintiff-Appellant, v. BROOKE MILES; ANDREA JACOBSON; LARRY WOOD; MARK HANDLEY; JOHN DAPCEVICH; SHEILA GALLAGHAER, Defendants-Appellees.	No. 04-35599 D.C. No. CV-02-00274-A-RRB District of Alaska, Anchorage ORDER

Before: GOODWIN, BRUNETTI, and W. FLETCHER, Circuit Judges.

Judge W. Fletcher has voted to deny the petition for rehearing en banc; and Judges Goodwin and Brunetti so recommend.

The full Court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc, filed April 5, 2006, is DENIED.

[header showing filing on 05/12/2006]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALASKA RIGHT TO LIFE COMMITTEE, Plaintiff-Appellant, v. BROOKE MILES; ANDREA JACOBSON; LARRY WOOD; MARK HANDLEY; JOHN DAPCEVICH; SHEILA GALLAGHAER, Defendants-Appellees.	No. 04-35599 D.C. No. CV-02-00274-A-RRB JUDGMENT

Appeal from the United States District Court for the District of Alaska (Anchorage).

This cause came on to be heart on the Transcript of the Record from the United States District Court for the District of Alaska (Anchorage) and was duly submitted.

On consideration whereof, it is now ordered and adjudged by this Court, that the judgment of said District Court in ths cause be, and hereby is **AFFIRMED**. Costs taxed.

Filed and entered Wednesday, March 22, 2006.

[attestation omitted]

U.S. Const. amend. I (in relevant part)

Congress shall make no law . . . abridging the freedom of speech[.]

Alaska Stat. § 15.13.040(d), (e), (j), (k)

Contributions, expenditures, and supplying of services to be reported. . . . (d) Every individual, person, nongroup entity, or group making an expenditure shall make a full report of expenditures, upon a form prescribed by the commission, unless exempt from reporting.

(e) The report required under (d) of this section must contain the name, address, principal occupation, and employer of the individual filing the report, and an itemized list of expenditures. The report shall be filed with the commission no later than 10 days after the expenditure is made. . . .

(j) Except as provided in (l) of this section, each nongroup entity shall make a full report in accordance with AS 15.13.110 upon a form prescribed by the commission and certified by the nongroup entity's treasurer, listing

(1) the name and address of each officer and director of the nongroup entity;

(2) the aggregate amount of all contributions made to the nongroup entity for the purpose of influencing the outcome of an election;

(3) for all contributions described in (2) of this subsection, the name, address, date, and amount contributed by each contributor and, for all contributions described in (2) of this subsection in excess of $250 in the aggregate during a calendar year, the principal occupation and employer of the

contributor; and

(4) the date and amount of all contributions made by the nongroup entity, and, except as provided for certain independent expenditures in AS 15.13.135(a), all expenditures made, incurred, or authorized by the nongroup entity, for the purpose of influencing the outcome of an election; a nongroup entity shall report contributions made to a different nongroup entity for the purpose of influencing the outcome of an election and expenditures made on behalf of a different nongroup entity for the purpose of influencing the outcome of an election as soon as the total contributions and expenditures to that nongroup entity for the purpose of influencing the outcome of an election reach $500 in a year and for all subsequent contributions and expenditures to that nongroup entity in a year whenever the total contributions and expenditures to that nongroup entity for the purpose of influencing the outcome of an election that have not been reported under this paragraph reach $500. . . .

(k) Every individual, person, nongroup entity, or group contributing a total of $500 or more to a group organized for the principal purpose of influencing the outcome of a proposition shall report the contribution or contributions on a form prescribed by the commission not later than 30 days after the contribution that requires the contributor to report under this subsection is made. The report must include the name, address, principal occupation, and employer of the individual filing the report and the amount of the contribution, as well as the total amount of contributions made to that group by that individual, person, nongroup entity, or

group during the calendar year.

Alaska Stat. § 15.13.050(a)

Registration before expenditure. (a) Before making an expenditure in support of or in opposition to a candidate or before making an expenditure in support of or in opposition to a ballot proposition or question, each person other than an individual shall register, on forms provided by the commission, with the commission.

Alaska Stat. § 15.13.065(a)

Contributions. (a) Individuals, groups, nongroup entities, and political parties may make contributions to a candidate. An individual, group, or nongroup entity may make a contribution to a group, to a nongroup entity, or to a political party.

Alaska Stat. § 15.13.067 (in relevant part)

Who may make expenditures. Only the following may make an expenditure in an election for candidates for elective office: . . .

(4) a nongroup entity that has registered under AS 15.13.050.

Alaska Stat. § 15.13.074(i)

Prohibited contributions. . . . (i) A nongroup entity may not solicit or accept a contribution to be used for the purpose of influencing the outcome of an election unless the potential contributor is notified that the contribution may be used for that purpose.

Alaska Stat. § 15.13.082(b)

Limitations on expenditures. . . . (b) A candidate, group, or nongroup entity may not make an expenditure unless the source of the expenditure has been disclosed as required by this chapter.

Alaska Stat. § 15.13.090

Identification of communication. (a) All communications shall be clearly identified by the words "paid for by" followed by the name and address of the candidate, group, nongroup entity, or individual paying for the communication. In addition, candidates and groups may identify the name of their campaign chairperson.

(b) The provisions of (a) of this section do not apply when the communication

(1) is paid for by an individual acting independently of any group or nongroup entity and independently of any other individual;

(2) is made to influence the outcome of a ballot proposition as that term is defined by AS 15.13.065(c); and

(3) is made for

(A) a billboard or sign; or

(B) printed material other than an advertisement made in a newspaper or other periodical.

Alaska Stat. § 15.13.110

Filing of reports. (a) Each candidate, group, and nongroup entity shall make a full report in accordance with AS 15.13.040 for the period ending three days before the due date of the report and beginning on the last day covered by the most recent previous report. If the report is a first report, it must cover the period from the beginning of the campaign to the date three days before the due date of the report. If the report is a report due February 15, it must cover the period beginning on the last day covered by the most recent previous report or on the day that the campaign started, whichever is later, and ending on February 1 of that year. The report shall be filed

(1) 30 days before the election; however, this report is not required if the deadline for filing a nominating petition or declaration of candidacy is within 30 days of the election;

(2) one week before the election;

(3) 105 days after a special election; and

(4) February 15 for expenditures made and contributions received that were not reported previously, including, if applicable, all amounts expended from a public office expense term account established under AS 15.13.116(a)(8) and all amounts expended from a municipal office account under AS 15.13.116(a)(9), or when expenditures were not made or contributions were not received during the previous year.

(b) Each contribution that exceeds $250 and that is made within nine days of the election shall be reported to the commission by date, amount, and contributor within 24 hours of receipt by the candidate, group, campaign treasurer, or deputy campaign treasurer. Each contribution to a nongroup entity for the purpose of influencing the outcome of an election that exceeds $250 and that is made within nine days of the election shall be reported to the commission by date, amount, and contributor within 24 hours of receipt by the nongroup entity.

(c) All reports required by this chapter shall be filed with the commission's central office and shall be kept open to public inspection. Within 30 days after each election, the commission shall prepare a summary of each report which shall be made available to the public at cost upon request. Each summary shall use uniform categories of reporting.

(d) [Repealed, § 35 ch 126 SLA 1994].

(e) A group formed to sponsor an initiative, a referendum or a recall shall report 30 days after its first filing with the lieutenant governor. Thereafter each group shall report within 10 days after the end of each calendar quarter on the contributions received and expenditures made during the preceding calendar quarter until reports are due under (a) of this section.

(f) During the year in which the election is scheduled, each of the following shall file the campaign disclosure reports in the manner and at the times required by this section:

(1) a person who, under the regulations adopted by the commission to implement AS 15.13.100, indicates an intention to become a candidate for elective state executive or legislative office;

(2) a person who has filed a nominating petition under AS 15.25.140 – 15.25.200 to become a candidate at the general election for elective state executive or legislative office;

(3) a person who campaigns as a write-in candidate for elective state executive or legislative office at the general election; and

(4) a group or nongroup entity that receives contributions or makes expenditures on behalf of or in opposition to a person described in (1)-(3) of this subsection, except as provided for certain independent expenditures by nongroup entities in AS 15.13.135(a).

Alaska Stat. § 15.13.400(3)

Definitions. . . . (3) "communication" means an announcement or advertisement disseminated through print or broadcast media, including radio, television, cable, and satellite, the Internet, or through a mass

mailing, excluding those placed by an individual or nongroup entity and costing $500 or less and those that do not directly or indirectly identify a candidate or proposition, as that term is defined in AS 15.13.065(c)[.]

Alaska Stat. § 15.13.400(4)

Definitions. . . . (4) "contribution"

(A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made and that is made for the purpose of influencing the nomination or election of a candidate, and in AS 15.13.010(b) for the purpose of influencing a ballot proposition or question, including the payment by a person other than a candidate or political party, or compensation for the personal services of another person, that are rendered to the candidate or political party;

(B) does not include

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a political party, candidate, or ballot proposition or question;

(ii) ordinary hospitality in a home;

(iii) two or fewer mass mailings before each election by each political party describing the party's slate of candidates for election, which may include photographs, biographies, and information about the party's candidates;

(iv) the results of a poll limited to issues and not mentioning any candidate, unless the poll was requested by or designed primarily to benefit the candidate; or

(v) any communication in the form of a newsletter from a legislator to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or legislative employee[.]

Alaska Stat. § 15.13.400(5)

Definitions. . . . (5) "electioneering communication" means a communication that

(A) directly or indirectly identifies a candidate;

(B) addresses an issue of national, state, or local political importance and attributes a position on that issue to the candidate identified; and

(C) occurs within the 30 days preceding a general or municipal election[.]

Alaska Stat. § 15.13.400(6)

Definitions. . . . (6) "expenditure"

(A) means a purchase or a transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, incurred or made for the purpose of

(i) influencing the nomination or election of a candidate or of any individual who files for nomination at a later date and becomes a candidate;

(ii) use by a political party;

(iii) the payment by a person other than a candidate or political party of compensation for the personal services of another person that are rendered to a candidate or political party; or

(iv) influencing the outcome of a ballet proposition or question;

(B) does not include a candidate's filing fee or the cost of preparing reports and statements required by this chapter;

(C) includes an express communication and an electioneering communication, but does not include an issues communication[.]

Alaska Stat. § 15.13.400(7)

Definitions. . . . (7) "express communication" means a communication that, when read as a whole and with limited reference to outside events, is susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate[.]

Alaska Stat. § 15.13.400(8)

Definitions. . . . (8) "group" means

(A) every state and regional executive committee of a political party; and

(B) any combination of two or more individuals acting jointly who organize for the principal purpose of influencing the outcome of one or more elections and who take action the major purpose of which is to influence the outcome of an election; a group that makes expenditures or receives contributions with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate shall be considered to be controlled by that candidate; a group whose major purpose is to further the nomination, election, or candidacy of only one individual, or intends to expend more than 50 percent of its money on a single candidate, shall be considered to be controlled by that candidate and its actions done with the candidate's

knowledge and consent unless, within 10 days from the date the candidate learns of the existence of the group the candidate files with the commission, on a form provided by the commission, an affidavit that the group is operating without the candidate's control; a group organized for more than one year preceding an election and endorsing candidates for more than one office or more than one political party is presumed not to be controlled by a candidate; however, a group that contributes more than 50 percent of its money to or on behalf of one candidate shall be considered to support only one candidate for purposes of AS 15.13.070, whether or not control of the group has been disclaimed by the candidate[.]

Alaska Stat. § 15.13.400(10)

Definitions. . . . (10) "independent expenditure" means an expenditure that is made without the direct or indirect consultation or cooperation with, or at the suggestion or the request of, or with the prior consent of, a candidate, a candidate's campaign treasurer or deputy campaign treasurer, or another person acting as a principal or agent of the candidate[.]

Alaska Stat. § 15.13.400(12)

Definitions. . . . (12) "issues communication" means a communication that

(A) directly or indirectly identifies a candidate and

(B) addresses an issue of national, state, or local political importance and does not support or oppose a candidate for election to public office[.]

Alaska Stat. § 15.13.400(13)

Definitions. . . . (13) "nongroup entity" means a person, other than an individual, that takes action the

major purpose of which is to influence the outcome of an election, and that

(A) cannot participate in business activities;

(B) does not have shareholders who have a claim on corporate earnings; and

(C) is independent from the influence of business corporations[.]

Alaska Stat. § 15.13.400(14)

Definitions. . . . (14) "person" has the meaning given in AS 01.10.060, and includes a labor union , non-group entity, and a group[.]

Alaska Admin. Code tit. 2, § 50.270

INDEPENDENT EXPENDITURES. (a) An expenditure is not an independent expenditure as defined in AS 15.13.400 if it is made in cooperation, consultation, or concert with or at the request, suggestion, or prior consent of a candidate, treasurer, or deputy treasurer, or an agent of the candidate, group or nongroup entity. An expenditure that is not an independent expenditure includes the following:

(1) an expenditure based on information about the candidate's, group's, or nongroup entity's plans, projects, or needs provided by the candidate or an agent of the candidate, group or nongroup entity;

(2) an expenditure made by any person, group, or nongroup entity based on data from a candidate's, group's, or nongroup entity's pollster or campaign consultant or any other person who receives compensation or reimbursement from the campaign;

(3) an expenditure made for the purpose of soliciting contributions to be paid to a candidate, group or nongroup entity;

(4) an expenditure made to finance the distribution of campaign material provided by the candidate, treasurer, campaign consultant, or any other agent of the candidate, group, or nongroup entity.

(b) Independent expenditures may be made without limit on the amount or frequency.

(c) A person making an independent expenditure must disclose the following on an independent expenditure report under AS 15.13.040(d) and (e):

(1) the date of the expenditure;

(2) the amount of the expenditure;

(3) the check number, if the expenditure is paid by check;

(4) the name and address of the payee;

(5) a description of items or services purchased;

(6) identification of the candidate or ballot proposition the expenditure was intended to influence;

(7) a statement as to whether the expenditure was intended to support or oppose the candidate or ballot proposition.

(d) To obtain an exemption from the requirements in AS 15.13.040 and AS 15.13.135, an individual must file a written exemption request with the commission and provide the nature of the expenditure and the need for an exemption. The exemption will be kept confidential pending a final determination by the commission. If the commission determines that the individual would likely be subject to undue harassment, threats, or economic reprisals as the result of public disclosure, the commission will grant the exemption. If the purpose of the expenditure is to sponsor or produce a communication, after publication the individual

granted an exemption shall provide the commission with a copy of the communication.

Alaska Admin. Code tit. 2, § 50.292

NONGROUP ENTITIES. (a) In 15.13 and this chapter, "nongroup entity"

(1) has the meaning given in AS 15.13.400; and

(2) is a nonprofit corporation, company, partnership, firm, association, organization, business trust, or society that qualifies to register to participate in election campaigns for or against a candidate or ballot proposition as provided in (b) of this section.

(b) Before it may make a contribution or independent expenditure, a nongroup entity must demonstrate to the satisfaction of the commission that it meets the qualifications in AS 15.13.400 by submitting the following items:

(1) if the nongroup entity is a corporation,

(A) a copy of a determination from the United States Internal Revenue Service that the corporation is a social welfare organization as described in 26 U.S.C. 501 (c)(4);

(B) a copy of the certificate of incorporation issued under AS 10.20 (Alaska Nonprofit Corporation Act) or under a substantially similar statute of another state;

(C) a copy of the corporation's articles of incorporation and bylaws;

(D) an affidavit from a director or officer that the corporation's purposes include one or more of the following:

(i) issue advocacy;

(ii) influencing elections;

(iii) research, training, or educational activities tied to the corporation's political goals; and

(E) an affidavit from a director or officer that the corporation does not include shareholders or persons other than employees who

(i) have an equitable interest in the corporation or are affiliated in a way that would allow them to make a claim on the organization's assets or earnings; or

(ii) receive a benefit that they would lose if they ended their affiliation with the corporation or that they could not obtain unless they became affiliated; for the purposes of this sub-subparagraph, "benefit" includes a credit card, an insurance policy, a savings plan, and education or business information;

(2) if the nongroup entity is not a corporation, a copy of the bylaws or minutes or an affidavit signed by an owner, officer, chair, director, partner, or board member showing that the nongroup entity does not participate in business activities, has no shareholders, and is independent from the influence of business corporations.

(c) If the commission staff determines after a review that the documentation submitted under (b) of this section is complete and adequate, the commission staff shall issue a determination that the nongroup entity qualifies to register. If the commission staff determines that the documentation is incomplete or inadequate, the commission staff may request and review addi-

tional information or notify the nongroup entity that it does not qualify to register.

(d) No later than 30 days after notice of a determination under (c) of this section, the nongroup entity may request that the commission review the determination. After reviewing the commission staff's determination and any additional information at its next regular meeting, the commission will issue a determination regarding whether the nongroup entity qualifies under this section. The commission will provide a copy of its determination to the nongroup entity. The commission's determination is a final order for the purpose of an appeal to the superior court under AS 44.62.560.

(e) Contributions that a nongroup entity receives for the purpose of making contributions or expenditures must be kept in a separate account and reported to the commission.

Alaska Admin. Code tit. 2, § 50.384

DISBURSEMENT OF GROUP CAMPAIGN ASSETS. (a) Following the election, a group may

(1) leave its money in a campaign account until the following election if the group plans to remain active;

(2) contribute the money to another candidate or group subject to the contribution limitations and other requirements of AS 15.13;

(3) donate the money to qualified charitable organizations under 26 U.S.C. 501(c)(3);

(4) repay its contributors; or

(5) pay for a victory or thank you party.

(b) A group may not disburse funds in a manner other

than that set out in (a) of this section except if approved by advisory opinion under AS 15.13.374.

Alaska Admin. Code tit. 2, § 50.394

Reporting final disbursement of campaign assets and satisfaction of campaign debts. (a) Within 10 days after the date all assets of a candidate's, group's, or nongroup entity's campaign account are disbursed and all campaign debts are paid, the candidate, group, or nongroup entity must file a final report setting out the disbursement of those assets and the payment of those debts.

(b) A candidate, group, or nongroup entity must continue to file year-end reports as required by AS 15.13.110(a)(4) for a campaign until the candidate, group, or nongroup entity files the final report required by (a) of this section.

(c) A candidate, group, or nongroup entity may not file the final report required by (a) of this section until all assets of the candidate's, group's, or nongroup entity's campaign account are disbursed and all campaign debts are paid.

(2)

No. 06-124

Supreme Court, U.S.
FILED
AUG 25 2006

CLERK

In The
Supreme Court of the United States

ALASKA RIGHT TO LIFE COMMITTEE,

Petitioner,

v.

BROOKE MILES, ANDREA JACOBSON, LARRY WOOD, MARK HANDLEY, JOHN DAPCEVICH, and SHEILA GALLAGHER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether Alaska's definition of "electioneering communication" in its state campaign finance disclosure laws violates the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 441 F.3d 773. The opinion of the district court (Pet. App. 42a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 2006. A petition for rehearing was denied on April 5, 2006. Pet. App. 49a. The petition for a writ of certiorari was filed on July 24, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Alaska Right to Life Committee (AKRTL) brought this case to challenge various Alaska campaign finance disclosure laws applicable to electioneering. AKRTL is a "nongroup entity" under Alaska law seeking to make "electioneering communications" without having to comply with Alaska's campaign finance disclosure requirements. Pet. 6, 11.[1]

[1] A "nongroup entity" is a "person, other than an individual, that takes action the major purpose of which is to influence the outcome of an election, and that (A) cannot participate in business activities; (B) does not have shareholders who have a claim on corporate earnings; and (C) is independent from the influence of business corporations[.]" Pet. App. 60a-61a (Alaska Stat. § 15.13.400(13)). An "electioneering communication" is "a communication that (A) directly or indirectly identifies a candidate; (B) addresses an issue of national, state, or local political importance and attributes a position on that issue to the candidate identified; and (C) occurs within the 30 days preceding a

(Continued on following page)

The laws in question are rooted in comprehensive campaign finance reform legislation enacted by the Alaska legislature in 1996 "to substantially revise Alaska's election campaign finance laws in order to restore the public's trust in the electoral process and to foster good government." Pet. App. 6a (quoting 1996 Alaska Sess. Law ch. 48 § 1). The Alaska Supreme Court upheld most of this legislation in *State of Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), *cert. denied*, 528 U.S. 1153 (2000).

There, the Alaska Supreme Court considered the constitutionality of a statute that banned independent expenditures by an entity supporting or opposing a candidate for state office unless the entity was a "group." *Id.* at 608. "Group" was defined as two or more individuals acting jointly who organize for the principal purpose of influencing one or more elections and who take action the major purpose of which is to influence the election. *Id.* n.65. The court upheld the ban as applied to those organizations potentially able to amass great wealth through state-created advantages, such as corporations and labor unions. *Id.* at 610. The court exempted from the ban those entities that could not participate in business activities, had no shareholders who have a claim on corporate earnings, and were independent from the influence of business corporations. It did so in order to be consistent with this Court's decisions in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). *Id.* at 611-13; *see also* Pet. App. 6a-7a (Court of Appeals' discussion of *Alaska Civil Liberties Union*).

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general or municipal election[.]" Pet. App. 58a (Alaska Stat. § 15.13.400(5)).

In 2001 and 2002, the Alaska Legislature again amended Alaska's campaign finance laws. It added provisions requiring those organizations that the Alaska Supreme Court had exempted from the ban to disclose their expenditures for electioneering communications. Pet. App. 9a-10a. Alaska patterned its requirements on the federal requirement in the Bipartisan Campaign Reform Act of 2002, Public L. No. 107-155, which amended the Federal Election Campaign Act. Ex. 9 to Miles Opposition to Motion for Summary Judgment [hereinafter Miles Opp. Summ. J.] at 4-5 (Jan. 27, 2003).

Turning to the facts and proceedings in this case, on the eve of the 2002 general election, counsel for AKRTL notified the Alaska Public Offices Commission that AKRTL or a similarly-named affiliate[2] planned a telephone electioneering campaign costing more than $500. Specifically, it planned to recite the following script, which refers by name to the Democratic and Republican gubernatorial candidates who were to appear on the ballot:

> Alaska Right to Life is always on the forefront of implementing pro-life legislation within our state, such as banning partial birth abortion, establishing parental consent and stopping state

[2] AKRTL is affiliated with Alaska Right to Life Political Action Committee ("AKRTL-PAC") and Alaska Right to Life, Inc. ("AKRTL Inc."). AKRTL is a non-profit organization exempt from federal income tax under 26 U.S.C. § 501(c)(4). Verified Complaint at 4. AKRTL-PAC is an advocacy organization, and AKRTL Inc. is a tax-exempt educational organization. The three entities share the same director and the same board of directors. The degree of financial separation among the three entities is unclear from the record. AKRTL-PAC is registered as a "group" with the Alaska Public Offices Commission. AKRTL is not registered. Pet. App. 2a. Counsel for AKRTL initially indicated that AKRTL Inc. was planning the telephone campaign. Ex. 2 to Miles Opp. Summ. J. at 2.

> funding. We believe these are important issues affecting all Alaskans. Frank Murkowski supports Alaska Right to Life's pro-life vision by supporting a ban on partial birth abortion, establishing parental consent and stopping state funding. But Fran Ulmer stands in opposition to these measures. Be sure to vote.

Pet. 8 n.13.

The Commission confirmed that the script fell squarely within Alaska's definition of "electioneering" and that AKRTL would have to comply with Alaska's disclosure requirements. Pet. 9-10; Pet. App. 58a (Alaska Stat. § 15.13.400(5)); Ex. 5 to Miles Opp. Summ. J. Alaska's law requires only that certain forms of disclosure be made; it does not prohibit electioneering communications or limit the amount of money a nongroup entity can spend in communicating its electioneering message. Pet. App. 11a.

A few days later, AKRTL filed suit and shortly thereafter moved for summary judgment. AKRTL challenged various provisions as unconstitutional on their face and as applied to its planned electioneering communications.[3] Its complaint preceded this Court's decision in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), which upheld the constitutionality of the similar federal definition of "electioneering communication" in the Bipartisan

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[3] The court of appeals summarized AKRTL's case as challenging (1) Alaska's definition of "electioneering communication," (2) the requirement that AKRTL register before making its campaign finance expenditures, (3) the requirement that AKRTL report its expenditures, (4) the requirement that AKRTL notify contributors and potential contributors that their contributions may be used to influence an election, and (5) the requirement that AKRTL disclose in its communications who is paying for its electioneering communications. Pet. App. 4a-5a.

Campaign Reform Act of 2002. In its complaint and its motion for summary judgment, AKRTL relied on essentially the same arguments that this Court later rejected in *McConnell*.

When it became apparent that this Court would move quickly to decide *McConnell*, the district court issued an order staying the case pending that decision. Order re Pending Motions in Abeyance (Aug. 26, 2003). In December 2003, this Court issued the *McConnell* opinion, rejecting the same bright-line "express advocacy" test that AKRTL had been asserting. After supplemental briefing on the effect of *McConnell*, the district court granted summary judgment against AKRTL and in favor of Miles. Pet. App. 42a-48a.

The United States Court of Appeals for the Ninth Circuit affirmed. In light of *McConnell*, the court stated it had "little trouble" concluding that Alaska's definition is not unconstitutionally vague or overbroad. Pet. App. 16a, 20a. With respect to the specific disclosure requirements, it applied strict scrutiny and found the burdens minimal and found the disclosure requirements justified by compelling state interests. Pet. App. 35a, 36a, 41a.

ARGUMENT

The court of appeals correctly held that Alaska's definition of "electioneering communication" does not violate the First Amendment. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals, and it does not otherwise raise issues that should be settled by this Court. Further review therefore is unwarranted.

A. The court of appeals' decision relied upon and closely followed this Court's recent decision in *McConnell*.

The court of appeals' decision in this case does not conflict with a decision of this Court; to the contrary, it carefully follows this Court's recent decision in *McConnell* on a closely-related issue.

The message that AKRTL desired to communicate on the eve of the 2002 general election fell squarely within Alaska's definition of "electioneering communication," which is very similar to the definition that the Court upheld in *McConnell*. Alaska's definition reads:

> "electioneering communication" means a communication that (A) directly or indirectly identifies a candidate; (B) addresses an issue of national, state, or local political importance and attributes a position on that issue to the candidate identified; and (C) occurs within the 30 days preceding a general or municipal election

Pet. App. 58a (Alaska Stat. § 15.13.400(5)). The federal definition, upon which Alaska's definition was patterned, reads:

> The term "electioneering communication" means any broadcast, cable, or satellite communication which –
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within –
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
>
> (III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

2 U.S.C. § 434(f)(3)(A)(i) (Supp. 2003) *quoted in McConnell*, 540 U.S. at 190-91.

AKRTL's challenge to Alaska's definition relied on an argument that this Court subsequently rejected in upholding the federal definition in *McConnell*. AKRTL argued that in *Buckley v. Valeo*, 424 U.S. 1 (1976), and thereafter, this Court had established an "express advocacy" bright-line test limiting state regulation to electioneering communications that expressly advocate the election or defeat of a candidate, such as by saying "vote for" or "vote against" the candidate.[4] The Court rejected precisely this argument in *McConnell*:

> In short, the concept of express advocacy and the concomitant class of magic words were born of an effort to avoid constitutional infirmities [of vagueness and overbreadth in the particular statutory language]. We have long "rigidly adhered" to

[4] In its complaint, AKRTL alleged that "Alaska's definition fails to meet *Buckley*'s constitutionally mandated express advocacy standard." Verified Complaint at 17. In its motion for summary judgment, it argued that Alaska law violated the "express advocacy test," which, it claimed, "is a bright-line, clearly defining which political speech may be regulated." Alaska Right to Life Committee's Memorandum in Support of Motion for Summary Judgment at 20 (Nov. 26, 2002).

> the tenet "'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" for "[t]he nature of judicial review constrains us to consider the case that is actually before us[.]" Consistent with that principle, our decisions in *Buckley* and *MCFL* were specific to the statutory language before us; they in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech.

540 U.S. at 192-93 (footnotes and citations omitted).

Having rejected a bright-line express advocacy test of constitutionality, the Court then found no vagueness or overbreadth problems with the federal definition of electioneering. As to vagueness, the Court stated:

> We observe that new FECA § 304(f)(3)'s definition of "electioneering communication" raises none of the vagueness concerns that drove our analysis in *Buckley*. The term "electioneering communication" applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. *These components are both easily understood and objectively determinable*. Thus, the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here.

Id. at 194 (emphasis added, citations omitted).

The Court then rejected the First Amendment challenge to disclosure requirements, finding the government's interests compelling.

> [T]he important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements – providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions – apply in full to BCRA. Accordingly, *Buckley* amply supports application of FECA § 304's disclosure requirements to the entire range of "electioneering communications."

Id. at 196 (footnote omitted).[5]

Following *McConnell*, it is unsurprising that the court of appeals had little difficulty in upholding Alaska law given that the Alaska provisions in question were patterned on the federal provisions upheld in *McConnell*. Looking first at the claim of vagueness, the court found only two minor differences from the federal definition, neither of which made Alaska's definition vague.

> We have little trouble concluding that the definition of "electioneering communication" contained in § 15.13.400(15) [sic] is not unconstitutionally vague, either facially or as applied.
>
> * * *
>
> From the standpoint of vagueness, there are only two possibly significant differences between the federal and the Alaska definition of "electioneering communication." First, under the federal

[5] These governmental interests support Alaska's campaign finance disclosure requirements. In addition, another, recognized by this Court in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), applies here: the interest in "requiring that contributors be informed that their money may be used for such a purpose [*i.e.*, for political purposes]." *Id.* at 261.

> definition, the candidate must be identified "clearly." By contrast, under the Alaska definition, the candidate must be identified "directly or indirectly." Second, under the federal definition, the content of the communication is not described beyond what might be implicit in the requirement that the communication be "targeted to the relevant electorate." By contrast, under the Alaska definition, the communication must "address[] an issue of national, state, or local political importance and attribute[] a position on that issue to the candidate identified."

Pet. App. 16a-17a.

As to the first difference (Alaska's use of the term "directly or indirectly"), the court of appeals found that "since the words 'direct and indirect' together describe the complete universe of possible methods of identification, the Alaska statute has the actual effect of requiring no specific method of identification, just like the federal definition." *Id.* at 17a-18a. It added:

> The Alaska legislature chose two words – "directly" and "indirectly" – that in combination were well suited to its purpose of regulating campaign communications identifying particular candidates. "Indirectly" is an easily understood word in common English usage. In the context in which it is used, it is neither vague nor difficult to understand.

Id. at 18a.

As to the second difference (Alaska's use of the term "address an issue of national, state, or local political importance"), the court reasoned:

> By comparison, the only restriction in the federal definition is that the communication be "targeted to the relevant electorate." The Supreme Court in *McConnell* upheld the federal definition against a vagueness challenge, despite the failure to describe the content of an "electioneering communication" except for whatever description might be implicit in the phrase "relevant electorate." In our view, "relevant," as used in the federal definition, is at least as vague a term as the phrase "addresses an issue of national, state, or local political importance," as used in the Alaska definition. In context, the requirement in the federal definition that the communication be targeted to the "relevant electorate" pretty clearly means that the communication must concern some issue of political importance to that electorate. But, of course, "issue" and "political importance" are precisely the words used in the Alaska statute. Those words are accompanied by the words "national, state, or local," but, if anything, those words make the provision less rather than more vague.

Id. at 19a. Thus, the court of appeals properly found that Alaska's definition of "electioneering communication" was even clearer and less vague than that upheld in *McConnell*.

The court of appeals likewise stated that it had "little trouble concluding that the definition of 'electioneering communication' is not unconstitutionally overbroad." *Id.* at 20a. With respect to facial overbreadth, AKRTL argued that Alaska's definition of "electioneering communication" is overbroad because it is not restricted to "express advocacy" or its functional equivalent and it includes some of what AKRTL called "issue advocacy." *Id.* The court found *McConnell*'s rejection of the bright-line "express advocacy"

test dispositive of this argument. *Id.* at 22a-23a. It also rejected AKRTL's argument that "issue advocacy" is included in the Alaska definition because the statute expressly excludes issues communications. *Id.* at 22a.

The court also found AKRTL's overbreadth as-applied argument to be without merit.

> That proposed message refers to several issues concerning abortion, ascribes positions on those issues to the two gubernatorial candidates, and urges the listener to vote. Under any reasonable understanding of that message, the listener is being urged to vote for or against these two candidates based on the positions described in the message. Such a message is clearly regulable under both *Buckley* and *McConnell*.

Id. at 23a-24a.

The court of appeals then turned from the definition of "electioneering communication" to AKRTL's challenge to specific disclosure requirements. The court "assume[d] without deciding that strict scrutiny applies to all of the challenged disclosure requirements, and that Alaska must advance a 'compelling state interest' to justify them." *Id.* at 29a. It held that "[e]ven under this standard * * * Alaska's disclosure requirements are justified." *Id.*

Applying strict scrutiny, the court found that the registration, reporting, and disclosure requirements to be "not significantly burdensome" and "not particularly onerous." *Id.* at 30a, 35a. It found that these minimal burdens were justified by compelling state interests.

> In light of the nature of the burdens imposed on a nongroup entity by Alaska's registration and

> reporting requirements, we hold that these requirements are justified by compelling state interests. * * * [A]s stated * * * succinctly by the Court in *McConnell*, those interests are "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." *McConnell*, 540 U.S. at 196.

Id. at 36a-37a. The court also found these compelling interests justified the requirement of disclosure of who pays for an electioneering communication. *Id.* at 41a; *see also* n.5, *supra*.

Thus, the court of appeals carefully and properly followed this Court's *McConnell* decision. AKRTL fails to show any conflict between the court of appeals' decision and *McConnell* or other decisions of this Court. Instead, it speculates that if this Court were to consider the merits of this case, it would reach a different conclusion that would conflict with the court of appeals' decision.[6] It also seizes on differences between Alaska's requirements and federal requirements approved in *Buckley*, *MCFL*, and *McConnell*, and argues that because Alaska law is somewhat different, a conflict exists. *E.g.*, Pet. 12-13, 17, 19. In its argument, AKRTL not only fails to show conflicting decisions, it relies on the same form of bright-line test of constitutionality

[6] The logical fallacy in assuming a different outcome to claim conflict is apparent from major headings in the petition in which AKRTL argues that "the 'electioneering communication' provision conflicts with the decisions of this Court and numerous decisions of other circuits by being unconstitutionally overbroad" and that "the 'electioneering communication' provision conflicts with decisions of this court and decisions of other circuits by being unconstitutionally vague." Pet. 15, 20.

that this Court expressly rejected in *McConnell*.[7] In short, AKRTL fails to show a conflict with decisions of this Court.

B. AKRTL fails to show a conflict with other appellate court decisions.

AKRTL also fails to show any conflict between the court of appeals' decision in this case and decisions of other courts of appeals.

AKRTL's first assertion of a conflict with the decisions of other courts of appeals is a passing reference to various federal and state appellate court decisions that it claims have "held that campaign finance laws that prohibit or regulate the discussion of public issues are constitutionally overbroad." Pet. 18-19 nn.15-17 and accompanying text. This reference, without any discussion, is wholly insufficient to demonstrate a conflict between the cited

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[7] *Compare* Pet. 12-13 ("[T]his Court has consistently protected the discussion of public issues by approving only limited regulation: a one time report on a narrow category of speech: 'express advocacy' and its fundamental equivalent, federally-defined 'electioneering communications.' Alaska, however, has greatly increased the level of regulation on a much broader category of expression * * * As a result, this petition should be granted because this case presents a matter of great public importance, because the decision of the Ninth Circuit conflicts with this Court's First Amendment jurisprudence, and because it creates numerous significant circuit splits.") (emphasis and citations omitted) *with McConnell*, 540 U.S. at 192-93 ("We have long rigidly adhered to the tenet never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, for the nature of judicial review constrains us to consider the case that is actually before us. Consistent with that principle, our decisions in *Buckley* and *MCFL* were specific to the statutory language before us; they in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech.") (citations and internal brackets and quote marks omitted).

decisions and the Ninth Circuit decision that Alaska's definition of "electioneering communication" is not overbroad. Further, all of the cases cited in notes 15-17 of the petition pre-date *McConnell*, which was decided in 2003. Given that the court of appeals properly followed *McConnell*, which rejected the bright-line "express advocacy" versus "issue communication" distinction, any alleged "conflict" with pre-*McConnell* decisions of other circuits does not support this Court's review.

Finally, it is noteworthy that AKRTL did not argue to the court of appeals that the allegedly conflicting cases were persuasive.[8]

AKRTL's second assertion of a conflict with other appellate decisions is its reference to various federal and state appellate court decisions that it claims "have held such vague definitions unconstitutional or narrowly construed them, because they have not encompass [sic] only express advocacy." Pet. 22 nn.21-24 and accompanying text. Again, a passing reference without any discussion of the holdings or analysis is insufficient to demonstrate a conflict with the court of appeals' decision that Alaska's definition of "electioneering communication" is not vague. Again, all the cases cited in footnotes 21-24 of the petition pre-date *McConnell*'s rejection of a rule of "express advocacy," therefore any conflict does not warrant this Court's review. And again, AKRTL did not argue below that the

[8] Of the 10 allegedly conflicting cases cited at notes 15-17 of the petition, AKRTL appears not to have discussed or even mentioned any in its appellate brief or reply brief below. *See* Brief of Appellant at iv-v; Reply Brief of Appellant at iv-v (tables of authorities).

allegedly conflicting cases from other circuits were persuasive.[9]

AKRTL's third claim of a conflict with other appellate decisions comes in its mention of decisions of two other circuits and of another panel of the Ninth Circuit that, it claims, "held that, in the wake of *McConnell*, the Constitution continues to require the courts to employ the express advocacy test to vague and overbroad statutes." Pet. 23 nn.25-26 and accompanying text. Again, AKRTL fails to analyze the cases and fails to demonstrate that a conflict exists which warrants this Court's review. Moreover, even based on AKRTL's summary description of these cases, it is clear that decisions of courts "employ[ing] the express advocacy test to vague and overbroad statutes" would not conflict with the Ninth Circuit's decision at issue because that court found the Alaska statutes neither vague nor overbroad.

Finally, AKRTL asserts, again without any discussion, that this decision conflicts with the decisions of other federal and state appellate courts that it claims "recognize the 'major purpose' test." Pet. 26. Once again, such an assertion without any discussion of the cases fails to demonstrate a conflict exists warranting this Court's review. Further, Alaska's definition of "nongroup entity" *does* include a "major purpose" element, one that focuses

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[9] Of the 19 allegedly conflicting cases cited at notes 21-24 of the petition, AKRTL appears to have raised only the Ninth Circuit case of *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004) in its appellate brief below. It mentioned a few of the other allegedly conflicting cases in passing in its reply brief, and even there did not even mention most of the cases that it now claims raise a conflict. *See* Brief of Appellant at iv-v; Reply Brief of Appellant at iv-v (tables of authorities).

on the action the nongroup entity takes, such as making electioneering communications, rather than on the more amorphous purpose of the organization, which seems to be the focus of the test asserted by AKRTL.[10] Thus, no conflict exists.

C. This case does not involve an important question of federal law that should be settled by this Court notwithstanding the absence of conflicting decisions.

Throughout its petition, AKRTL refers to the challenged provisions as "prohibiting" AKRTL's ability to engage in political speech. *See, e.g.*, Pet. 3, 15, 16, 25. This is misleading and factually incorrect, since the provisions at issue only require *disclosure* of electioneering activities and do not *prohibit* any speech. As the court of appeals stated, "None of the challenged provisions limits the amount of money a nongroup entity such as AKRTL may spend [on electioneering communications]. Rather, the provisions require only that certain forms of disclosure be made." Pet. App. 11a.

AKRTL's argument that the "Alaska provisions seriously limit the ability of advocacy groups to discuss

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[10] Alaska defines "nongroup entity" as an entity "*that takes action the major purpose of which is to influence the outcome of an election*, and that (A) cannot participate in business activities; (B) does not have shareholders who have a claim on corporate earnings; and (C) is independent from the influence of business corporations." Pet. App. 60a-61a (Alaska Stat. § 15.13.400(13) (emphasis added)). AKRTL asserts in its petition: "AKRTL does not have the major purpose of nominating or electing candidates. * * * As a result, the court's decision below, upholding these PAC-style requirements, conflicts with the decisions of this Court [and] creates a Circuit split with the [specified circuits], which recognize the 'major purpose' test." Pet. 25-26.

issues of public concern" also is misleading and incorrect, in two ways. First, the provisions at issue apply only to that narrow category of speech that falls within Alaska's definition of "electioneering communications" and not to broader discussion of "issues of public concern." For a nongroup entity's speech to meet this definition, and hence for disclosure to be required, the communication must (1) occur within the 30 days preceding an election, (2) cost more than $500, (3) identify a candidate, (4) address an issue of political importance, and (5) attribute a position on that issue to the candidate identified. Pet. App. 56a-57a (Alaska Stat. § 15.13.400(3)); *id.* at 58a (Alaska Stat. § 15.13.400(5)). Thus, registration and disclosure requirements are triggered only by electioneering expenditures that meet all of these threshold elements. They do not extend to general discussion of issues of public concern.

Second, AKRTL's argument that this case involves limitations on the ability of "advocacy groups" in general to discuss issues of public concern also is misleading. Its challenge relates to (and it has standing to challenge only) the constitutionality of the provisions applicable to that narrow category of nongroup entities that are organizations that are tax-exempt under section 501(c)(4) of the Internal Revenue Code. *See* n.2, *supra*. This limits the general applicability of this case. For example, the registration requirements of which it complains apply only to corporations (and in fact only to corporations organized under section 501(c)(4) of the Internal Revenue Code) and do not apply generally to non-corporate advocacy groups.[11]

[11] AKRTL complains that Alaska imposes a "time-consuming and burdensome procedure to determine if one is a 'nongroup entity,' which must be completed before it is permitted to make either an independent

(Continued on following page)

Finally, AKRTL's suggestion that the provisions at issue go "well beyond" those approved recently by this Court in *McConnell* not only is unsupported, it is contrary to the court of appeals' decision. Pet. 14. AKRTL fails to show how Alaska law goes so far "beyond what this Court approved in *McConnell*" that this case presents questions of important public concern warranting review less than three years after *McConnell*. *Id.* Moreover, its argument that Alaska goes well beyond federal law is undercut by the fact that the court of appeals considered and rejected its overbreadth and burden claims. Its argument that review is warranted by a multiplicity of state statutes that go beyond federal law also is undercut by the apparent lack of any other state court decisions on the constitutionality of state provisions. *See* Pet. 14 n.14 (asserting that "fourteen states have 'electioneering communication' provisions, most of which are broader than the federal provision," but not referring to any decisions on their constitutionality).

In sum, AKRTL has wholly failed to show any basis for its assertion that this case presents an important question of federal law that should be settled by this Court.

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expenditure or an electioneering. Alaska Admin. Code tit. 2, § 50.292." Pet. 4 n.6. However, it fails to acknowledge that as a 501(c)(4) corporation, it is subject to different requirements under Alaska Admin. Code tit. 2, § 50.292(a) than are other nongroup entities, which have more streamlined registration procedures. Under Alaska Admin. Code tit. 2, § 50.292(b), all that is required for registration "if the nongroup entity is not a corporation, [is] a copy of the bylaws or minutes or an affidavit signed by an owner, officer, chair, director, partner, or board member showing that the nongroup entity does not participate in business activities, has no shareholders, and is independent from the influence of business corporations." Pet. App. 64a (Alaska Admin. Code tit. 2, § 50.292(b)(2)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Sep 1 2006

No. 06-124

In The
Supreme Court of the United States

ALASKA RIGHT TO LIFE COMMITTEE, *Petitioner,*
v.
BROOKE MILES, ANDREA JACOBSON, LARRY WOOD, MARK HANDLEY, JOHN DAPCEVICH, and SHEILA GALLAGHER, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Corporate Disclosure Statement

Alaska Right to Life Committee has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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Argument

As set out in the Petition, the Court should grant certiorari because (1) this case involves a matter of great public importance, (2) Alaska's "electioneering communication" definition conflicts with the decisions of this Court and other circuits due to overbreadth, (3) the definition conflicts with decisions of this Court and other circuits due to vagueness, and (4) Alaska's PAC-style regulation of *MCFL*-corporations lacking the major purpose of nominating or electing candidates conflicts with decisions of this Court and other circuits.

Respondents ("APOC") attempt in their Opposition to evade these reasons for granting certiorari by rewriting First Amendment jurisprudence in general and *McConnell v. FEC*, 540 U.S. 93 (2003), in particular. But as shown herein (I) conflicts remain, (II) this case is of vital importance to First Amendment liberties, and (III) this case was wrongly decided below.[1]

I. The Decision Below Conflicts with Decisions of this Court and Circuit Courts.

This Court has consistently required strict scrutiny of restrictions infringing on core First Amendment liberties because of the necessity of protecting this nation's "'profound

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[1]In broad perspective, this case presents an underlying analytical question of great public importance, i.e., whether *McConnell* eliminated First Amendment protection for issue advocacy, and two important specific questions: (a) how far may states expand the definition of "electioneering communication" beyond what this Court approved in *McConnell* and (b) how far may states expand the restrictions placed on *MCFL*-corporations who make electioneering communications? States may overreach even under the intermediate scrutiny afforded contribution limits. This Court has recently rejected overreaching efforts by a state. *See Randall v. Sorrell*, 126 S. Ct. 2479 (2006) (holding that Vermont's expenditure and contribution limits violated the First Amendment under the holding of *Buckley v. Valeo*, 424 U.S. 1 (1976)).

national commitment to the principle that debate on public *issues* should be uninhibited, robust, and wide-open'" *Buckley*, 424 U.S. at 14 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (emphasis added). This protection of issue advocacy is inherent in the First Amendment, which protects against governmental infringements of free expression unless the government can meet the strict-scrutiny burden of justifying a restriction. The Petition set out numerous decisions recognizing the constitutional protection of issue advocacy.

APOC argues that this Court's statement in *McConnell* that the express advocacy line was not constitutionally required absent vagueness or overbreadth, 540 U.S. at 192-93, eliminates constitutional protection for issue advocacy. Opposition 11-15. As APOC would have it, this eliminates any conflict between all the decisions that recognize protection for issue advocacy and the failure of Alaska's law and the Ninth Circuit to adequately protect issue advocacy.

But that is not what *McConnell* did. In *McConnell*, this Court was confronted with a statute that prohibited[2] corporations from making electioneering communications from general treasury funds, requiring them do so through a PAC instead. In

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[2]In the case at bar case we deal with both disclosure (of an overly burdensome sort) and a *prohibition*. APOC argues that Alaska's restrictions "only require *disclosure* of electioneering activities and do not *prohibit* any speech." Opposition 17 (emphasis in original). But unless an *MCFL*-corporation submits to unconstitutional PAC-style burdens, it is *prohibited* from making electioneering communications. So unless AKRTL submits an application and is approved to pre-register as a "nongroup entity" (an *MCFL*-corporation) it is prohibited from making any electioneering communications. If it gains APOC's approval, it may make electioneering communications subject to periodic reporting, from which it may escape only by ceasing to exist. Petition 4-6. Alaska's restrictions prohibit *MCFL*-corporations from making "electioneering communications" by imposing on them the very sort of PAC-style restrictions from which *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262-64 (1986) ("*MCFL*"), and *McConnell*, 540 U.S. at 211, said they were exempt.

response to the *McConnell* plaintiffs' argument "that the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications," 540 U.S. at 205-06, this Court responded that "[t]his argument *fails to the extent that* the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the *functional equivalent of express advocacy*." *Id.* at 206 (emphasis added).

So after *McConnell* only two tightly-defined restrictions on issue advocacy had survived strict scrutiny: (1) express advocacy and (2) its facially-proven functional equivalent, i.e., federally-defined electioneering communications. Any restrictions beyond these two remains in the realm of protected issue advocacy. This is so because the First Amendment *automatically* protects issue advocacy unless the state sustains its strict-scrutiny burden of justifying a restriction. So all the decisions of this Court and other federal courts striking down (or narrowly construing) restrictions on issue advocacy beyond the realm of express advocacy remain valid law except with the added gloss that one functional equivalent to express advocacy has now been recognized. To hold that there is no protection of issue advocacy outside these two narrowly-defined areas would be to hold that the First Amendment has been repealed.

There is a second conflict. To implement the First Amendment's protection of issue advocacy, this Court and numerous other federal courts have required a *full* strict scrutiny analysis. Here again, there is a conflict between the holdings of this Court and other federal courts and the decision below. APOC and the Ninth Circuit consider *McConnell* a license to impose restrictions on First Amendment liberties, especially if the restrictions are styled as mere "disclosure."[3] Under this view, it is enough to (a) point to some recognized compelling interests

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[3]Alaska goes beyond mere disclosure. *Supra* at n. 2

justifying disclosure in general and then (b) ignore narrow tailoring in favor of a rough-similitude test that says that these restriction are something like restrictions already approved, all the while ignoring the crucial distinctions between the actual definitions that are the essence of narrow-tailoring analysis. For this reason alone, this Court should accept this case for review and reaffirm strict scrutiny in this crucial area of the people's liberty.

This truncated view of strict scrutiny is evident in APOC's argument that the Ninth Circuit really *did* use strict scrutiny because it *talked* about "strict scrutiny" and "compelling state interests." Opposition 12. But the failure of APOC and the lower court to mention (or employ) *narrow tailoring* is evident in the following excerpt from the Opposition, quoting the Ninth Circuit:

> The [Ninth Circuit] "assume[d] without deciding that strict scrutiny applies to all of the challenged disclosure requirements, and that Alaska must advance a '*compelling interest*' to justify them.' . . . Applying strict scrutiny the [Ninth Circuit] found that [sic] the registration, reporting, and disclosure requirements to be "not significantly burdensome" and "not particularly onerous." . . . It found that these minimal burdens were justified by *compelling state interests*. . . . "[W]e hold that these interests are justified by *compelling state interests*."

Opposition 12 (quoting Ninth Circuit opinion; citation omitted) (emphasis added). Conspicuously absent is any mention of narrow tailoring.

The "exacting scrutiny applicable to limitations on core First Amendment rights of political expression," *Buckley*, 424 U.S. at 44-45, includes both the finding of a compelling interest and a close examination of whether a particular restriction is necessary to advance that interest, is narrowly tailored to avoid

reaching too broadly, and is the least restrictive means of advancing the compelling interest—all with the proof burden on the State. So it was not enough for APOC and the Ninth Circuit to simply point to the existence of compelling interests justifying "disclosure" and say that Alaska's restrictions don't seem very burdensome to them. Narrow tailoring does not tolerate the rough-similitude analysis that the Ninth Circuit and APOC substituted for strict scrutiny by pointing to the federal model as providing the pattern but providing no evidence or analysis justifying the leap from restricting broadcast ads to restricting all public communications and directly targeting public issue discussion.[4]

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[4]Strict scrutiny mandates narrow-tailoring analysis:

> Under the strict-scrutiny test, [the State has] the burden to prove that the [restriction] is (1) narrowly tailored, to serve (2) a compelling state interest. *E.g., Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222 (1989). In order to show that a given statute is narrowly tailored, the State must demonstrate that it does not "unnecessarily circumscrib[e] protected expression."

Republican Party of Minnesota v. White, 536 U.S. 765, 775 (2002) (quoting *Brown v. Hartlage*, 456 U.S. 45, 54 (1982)). Where First Amendment rights are involved, the government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (internal quotation marks and citation omitted); *see also Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 n. 22 (1984) ("[This Court] may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity."). *See also Ashcroft v. ACLU*, 542 U.S. 656, 659 (2004); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000); *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Infringements on [the right to associate for expressive purposes] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of

As discussed in Part III, APOC's arguments and the decision below do not establish that either (a) Alaska's expanded electioneering communication definition or (b) its imposition of the same restrictions on *MCFL*-corporations that it imposes on PACs is permissible under strict scrutiny's narrow-tailoring analysis.

Another key conflict is the Ninth Circuit's upholding of PAC-style burdens on *MCFL*-corporations that lack the major purpose of nominating or electing candidates. Petition 23-26. APOC's only defense is that there is no conflict because Alaska really does have a major purpose test, but as explained below, *infra* at 9, it is not the *required* major purpose test.[5]

II. This Case Presents Important Questions of Law on Matters of Great Public Importance.

In addition, certiorari should be granted because this is a case of great public importance and raises important questions of law. APOC paints the decision below as being a simple application of *McConnell*. It is not.

Alaska is targeting and restricting issue advocacy beyond the two narrowly-defined restrictions recognized in *McConnell*, i.e., express advocacy and its proven functional equivalent in

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associational freedoms.").

[5]As set out in the Petition, the decision below also conflicts with decisions of this Court and federal circuit courts because such vague phrases as Alaska employs have been construed to require the express advocacy test or have been struck down. Petition 20-23. APOC simply recites the Ninth Circuit's holding that the challenged provisions were not vague, Opposition 8-11, which addresses whether the Ninth Circuit wrongly decided the vagueness challenges (to be briefed on the merits), not whether similar phrases have been construed or struck as void for vagueness.

In addition, the Ninth Circuit's approval of Alaska's imposition of PAC-style burdens on groups without the major purpose of nominating or electing candidates presents a clear conflict with the decisions of this Court and federal circuit courts holding that PAC status may not be imposed absent such a major purpose. Petition 23-26.

the form of federally-defined electioneering communications. Alaska has expanded its electioneering communication definition to include all public communication media (not just broadcasting), and it has added a vaguely-defined content element specifically targeting public issue advocacy on important matters of public debate. Other states are enacting similar statutes. Petition 14 n.14.

Alaska is imposing PAC-style burdens on *MCFL*-corporations that lack the major purpose of nominating or electing candidates and that were specifically exempted from being (or having) PACs in order to do electioneering communications. *McConnell*, 540 U.S. at 211.

The Ninth Circuit viewed *McConnell* as carte blanche for states to ignore the Constitutional protection of issue advocacy, ignore the second prong of strict scrutiny, and ignore the major purpose test. The states and the people require the protection of this Court for their liberties of expression and association and the correction of the Ninth Circuit lest its error spread.

III. The Decision Below Was Wrongly Decided.

APOC argued, as noted above, that the Ninth Circuit really *did* do strict scrutiny analysis because the Court *talked* about strict scrutiny and compelling interests. But the Ninth Circuit did not talk about narrow tailoring. Rather, it stated its view that the restrictions were neither "burdensome" nor "onerous." *See supra* at 4. But narrow tailoring is not about how "burdensome" or "onerous" a restriction is. Rather, it is about whether there is a close nexus between the compelling interest and the restriction and whether there are less-restrictive means to achieve the compelling interest.[6]

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[6]In two decisions, this Court has described narrow tailoring as requiring a "nexus" between the compelling interest and the restriction. *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988) ("nexus" must be more than "tenuous"); *Virginia v. Black*, 538 U.S. 343, 365-67 (2003) (where an action may indicate both permissible and impermissible intent, a

The question of the degree of burden on First Amendment interests (which the Ninth Circuit addresses here) and whether it rises to a significantly cognizable level to require strict scrutiny was already answered in *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), which held that where PAC-style burdens are imposed, there is a sufficient burden on First Amendment rights so that the state must bear the strict-scrutiny burden of justifying the restriction. *Id.* at 256.

What is glaringly absent from the record and the arguments of APOC and the Ninth Circuit is any evidence that there is a particular problem with nonbroadcast communications (meeting Alaska's electioneering communication definition) before elections that would make them the "functional equivalent of express advocacy." *McConnell*, 540 U.S. at 206. There were none of the studies of the sort put in evidence in the *McConnell* case, which all related to broadcast ads. *See* 540 U.S. at 207 ("torrent of televised . . . ads"). While a legislative body need not conduct new studies or produce independent evidence from other legislative bodies, but may rely on what others have done, *Missouri Rep. Pty. v. Lamb*, 270 F.3d 567, 570 (8th Cir. 2001) (quoting *City of Renton v. Playtime Theatres*, 475 U.S. 41, 51-52 (1986)), because Alaska went beyond what anyone else has justified in its electioneering communications definition, it was required to bear the burden of justifying its dramatic expansion. It did not. And the Ninth Circuit did not require of Alaska the "precision of regulation" mandated in strict scrutiny.[7]

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presumption that tips the scales one way or the other is invalid in the First Amendment area). The Ninth Circuit has also recognized the need for a proper "fit" when doing strict scrutiny analysis. *ACLU of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004). APOC has attempted no proof of a "nexus" or "fit" between any compelling interest and restricting all public communications that mention candidates and discuss public issues during prohibition periods.

[7]This Court has recently reiterated that narrow tailoring excludes prophylaxis:

APOC also did not meet its burden of proving constitutional justification for imposing on *MCFL*-corporations, which lack the major purpose of nominating or electing candidates, the same pre-registration, periodic-reporting, destructive-termination restrictions that it places on PACs. APOC instead relied on the Ninth Circuit's statement that Alaska's burdens were neither "burdensome" nor "onerous." *See supra* at 4. This is not narrow-tailoring analysis as already noted, and so fails strict scrutiny.

APOC actually asserts that Alaska has a "'major purpose' element," but simply reciting APOC's own words reveals that this "element" is not *the* major purpose test that establishes whether a group may properly be treated as a PAC:

> Alaska's definition of "nongroup entity" *does* include a "major purpose" element, one that focuses on the action the nongroup entity takes, such as making electioneering communications, rather than on the more amorphous purpose of the organization, which seems the focus of the test asserted by AKRTL.

Opposition 17; *see also* 17 n. 10 (definition). APOC's sole reliance on this major purpose element to show that there is no conflict with the decisions of this Court and federal circuit

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> [N]arrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored. *E.g.*, *Consolidated Edison Co.* [*v. Public Serv. Comm'n*], 447 U.S. [530,] 537-38 [(1980)] ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* [*v. Button*], 371 U.S. [415,] 438 [(1963)] (citations omitted).

Riley, 487 U.S. at 801. *See also In re Primus*, 436 U.S. 412, 432-33 (1978) (cautioning that "First Amendment freedoms need breathing space to survive, [and] government may regulate in [this] area only with narrow specificity"); *Edenfield v. Fane*, 507 U.S. 761, 777 (1993); *United States v. Robel*, 389 U.S. 258, 266 (1967).

courts fails to demonstrate the lack of conflict and reveals that the decision below was wrongly decided. Opposition 17.

That there is a less restrictive, pre-approved means of advancing the compelling interests in disclosure that APOC and the Ninth Circuit assert concerning electioneering communications is obvious with a glance at the federal model. Petition 23-24. AKRTL does not object to the one-time disclosure that federal law imposes for *MCFL*-corporations making "electioneering communications" or "independent expenditures" because such reports are narrowly tailored to recognized compelling interests, unlike the burdensome level of compliance and disclosure imposed by Alaska's PAC-style restrictions.

Conclusion

This case involves matters of great public importance, and the decisions below conflict with decisions of this and other federal courts, so this Court should grant certiorari.

Respectfully submitted,

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